TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1957

No. 92

UNITED STATES OF AMERICA, APPELLANT,

vs.

CHARLES T. HVASS

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA

FILED MARCH 21, 1957
JURISDICTION POSTPONED JUNE 3, 1957

Supreme Court of the United States

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[fol. 1] CAPTION—Omitted in printing

[fol. 2] IN THE

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA CENTRAL DIVISION

UNITED STATES OF AMERICA, *Plaintiff*,

v.

CHARLES T. HVASS, *Defendant*.

INDICTMENT—Filed March 20, 1956

The Grand Jury Charges:

COUNT I

That CHARLES T. HVASS, on or about October 12, 1955, at Mason City, in the United States District Court in the Central Division of the Northern District of Iowa, in violation of Section 1621, Title 18, United States Code, having duly taken an oath administered by the Clerk of said court, at a hearing in a matter then and there pending before said court in which a law of the United States authorizes an oath to be administered, that he would testify truly, did unlawfully, wilfully, and knowingly, and contrary to said oath, state material matters which he did not believe to be true, that is to say:

That at the time and place aforesaid, and in a hearing conducted in said court upon the application of said Charles T. Hvass requesting his temporary admission to the bar of said court under and pursuant to the provisions of Rules 3 and 8, Local Rules of the United States District Court, Northern District of Iowa, the said Charles T. Hvass appeared as a witness on his own behalf, and gave testimony under oath to make satisfactory showing of his compliance with standards of professional ethics as is required of attorneys for such admission under said rules.

[fol. 3] That it was material to the determination of matters brought before the court at said hearing, to as-

certain true facts as to whether or not Charles T. Hvass, or any member or agent of the firm of attorneys with which he was then associated, or anyone on his or their behalf (1) had solicited prospective litigants to secure the employment of the said Charles T. Hvass or of his firm, to represent said prospective litigants as their attorneys; (2) had offered to maintain prospective litigants in suit; or (3) had employed or otherwise engaged agents to seek and secure the employment of said Charles T. Hvass or his firm by prospective litigants; and whether or not said Charles T. Hvass was a credible witness.

That at the time and place aforesaid the defendant, duly appearing as a witness before said court, and then and there being under oath as aforesaid, did testify falsely before said court with respect to the aforesaid material matters as follows:

"Q Mr. Hvass, on any case that you have handled in Iowa or elsewhere have you—have you or anyone from your office ever solicited business?
A No, sir.
Q —or asked for employment?
A I would say absolutely not, not willingly or intentionally.
Q You are positive of that?
A Yes, sir, I am. I mean, I can speak only of my personal knowledge, and I am sure none of the men in the office would have."

That the aforesaid testimony of the defendant, as he then and there well knew and believed, was false.

[fol. 4] COUNT II

The Grand Jury realleges all of the allegations of the first three paragraphs of Count I of this indictment.

That at the time and place aforesaid the defendant, Charles T. Hvass, duly appearing as a witness before said court, and then and there being under oath as aforesaid, did testify falsely before said court with respect to the aforesaid material matters as follows:

"Q Has anyone in your office or your firm ever paid fees to anyone referring business to your office?

A No, sir, we have not. Other than an attorney with respect to a forwarding fee. Most of them want that. And I probably—between fifty and seventy-five per cent of our business comes from other lawyers, and of course other lawyers that send business to us we would do this, we would divide the fee in cases like that."

That the aforesaid testimony of the defendant, as he then and there well knew and believed, was false.

COUNT III

The Grand Jury realleges all of the allegations of the first three paragraphs of Count I of this indictment.

That at the time and place aforesaid the defendant, Charles T. Hvass, duly appearing as a witness before said court, and then and there being under oath as aforesaid, did testify falsely before said court with respect to the aforesaid material matters as follows:

"Q Have you ever offered a litigant or a prospective litigant to furnish him with funds if he required them?
A No, sir.
Q —prior to employment—
A No, sir."

That the aforesaid testimony of the defendant, as he then and there well knew and believed, was false.

[fol. 5] COUNT IV

The Grand Jury realleges all of the allegations of the first three paragraphs of Count I of this indictment.

That at the time and place aforesaid the defendant, Charles T. Hvass, duly appearing as a witness before said court, and then and there being under oath as aforesaid, did testify falsely before said court with respect to the aforesaid material matters as follows:

"Q Did you suggest that Mr. Tesar employ your firm?
A No, there was no considerable discussion. I recall this man, he had a lot of matters, he was very much concerned, and he wanted to know

what his case was worth, the best of my opinion was on it. And I believe my views on this case was far less than what he thought his case was worth. I told him—I left a contract and I told him if he wanted to retain our firm he could mail the contract to us. That was the last I ever saw or heard of him."

That the aforesaid testimony of the defendant, as he then and there well knew and believed, was false.

A True Bill

/s/ Meyer Wolff
Foreman

/s/ F. E. Van Alstine
United States Attorney.

Bail fixed in the sum of $1500.00

/s/ Henry N. Graven
HENRY N. GRAVEN

United States District Judge,
Northern District of Iowa.

[fol. 6] IN THE

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA
CENTRAL DIVISION

(Title Omitted)

MOTION TO DISMISS THE INDICTMENT—Filed Nov. 13, 1956

TO: UNITED STATES OF AMERICA, AND TO F. E. VAN ALSTINE, ITS ATTORNEY:

Pursuant to Rule 12 of the Federal Rules of Criminal Procedure for the District Courts of the United States, defendant above named moves the Court for its Order dismissing the Indictment on the ground that the Indict-

ment does not state facts sufficient to cause an offense against the United States.

WARREN B. KING
945 Northwestern Bank Building
Minneapolis 2, Minnesota

M. E. RAWLINGS
561 Orpheum Electric Building
Sioux City, Iowa
Attorneys for Defendant

By /s/ Warren B. King
Warren B. King

CHARLES ALAN WRIGHT
324 Townes Hall
Austin 12, Texas
Of Counsel

(File Endorsement Omitted)

[fol. 7] IN

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CENTRAL DIVISION

Criminal No. 2358

UNITED STATES OF AMERICA, *Plaintiff*,

v.

CHARLES T. HVASS, *Defendant*.

MEMORANDUM DECISION—Dec. 21, 1956

[fol. 8] This matter is before the Court upon the defendant's motion to dismiss the indictment on the ground that the same does not state facts sufficient to constitute an offense against the United States.

The defendant, Charles T. Hvass, is an attorney with his office in Minneapolis, Minnesota, and is a member in good standing of the bars of the states of Minnesota and

Texas, and has been admitted to practice before the United States District Court for the District of Minnesota, and the United States Court of Appeals for the Eighth Circuit. Hvass represented injured workmen in two suits which were filed in this court, Wyrum v. Mason City & Clear Lake Railroad Co., Civil No. 644, and Lash v. Chicago Great Western Railway Co., Civil No. 663. At the time those suits were filed in this court, Local Rule 3 of the Northern and Southern Districts of Iowa provided as follows:

> "All attorneys residing outside of the state of Iowa and having civil matters in the court shall associate with them a resident attorney on whom notice may be served and who shall have the authority to act for and on behalf of the client in all matters, including pre-trial conferences and the trial of the case. Such resident attorney shall be a member of the bar of the District, shall sign the first pleading filed and continue in the matter unless other qualified resident counsel be substituted. Non-resident attorneys who have so associated with them a resident attorney shall be permitted to participate in a particular case upon satisfactory showing of good moral character."

The evident purpose of the rule is to assure the court that when out of state attorneys appear as counsel in any case, that there will be no delays for hearings on motions, pre-trial conferences and other matters which may arise during the trial, and so that service of papers may be accomplished locally at any stage of the proceedings. A similar rule will be found in the rules of most [fol. 9] United States District Courts.

Subsequent to the commencement of the Wyrum and Lash cases, and on August 31, 1955, the judges of the Northern and Southern Districts of Iowa entered an order amending Rule 3 by adding thereto the following proviso:

> "Provided further that where the action is one to recover damages for personal injuries sustained in Iowa by one who at the time was a resident of Iowa or the action is one to recover damages for the death of a resident of Iowa resulting from personal in-

juries sustained in Iowa, the court may on its own motion, or on motion of a member of the bar of either District, before permitting a non-resident attorney to participate in the case, require a satisfactory showing that the connection of the said attorney, or the firm or attorney with which he is associated, was not occasioned or brought about in violation of the standards of conduct specified in Rule 8 hereof. The court as a part of said showing may require the plaintiff and the said attorney to appear and be examined under oath."

It is this amended Rule 3 with which we are now concerned. The amendment became effective on October 1, 1955, as to actions then pending or thereafter commenced.

On October 3, 1955, the court entered an order fixing October 12, 1955, as the date for non-resident attorneys in the Wyrum and Lash cases to appear, if they wished to participate in those actions, and be examined under oath in regard to matters within the scope of amended Rule 3. The defendant Hvass did appear, and was examined under oath by the United States Attorney. Administration of the oath to Hvass was not a part of any judicial proceeding in the Wyrum and Lash cases, but rather was a part of an administrative proceeding by which the court sought to determine whether Hvass should be permitted to participate as an attorney in those cases. Two further hearings were held, and witnesses subpoenaed both by the United States and by the defendant Hvass, were examined and cross-examined. [fol. 10] Thereafter, on November 1, 1955, the court entered an order finding that the injuries for which recovery was sought in each case were sustained in the State of Iowa by residents of Iowa, and that "the applicant has not made satisfactory showing of the matters which must be satisfactorily shown under said Local Rule 3." Thus the court denied the application of Hvass to participate in the two cases and struck the appearance of the firm of Hvass, Weisman, Peterson, King and Schwappach as attorneys for plaintiff in each case.

On March 20, 1956, the present indictment was returned, charging the defendant Hvass with the crime of

perjury under four separate counts in violation of 18 U.S.C.A. Sec. 1621.[1] The indictment charges under each count thereof that the alleged false testimony was given under and pursuant to the provisions of Rule 3, supra, and Rule 8,[2] Local Rules of the United States District Court, Northern District of Iowa.

[fol. 11] Let us first consider briefly the rule making power of a United States District Court. Such rule making power is found in 28 U.S.C.A. Sec. 2071:

> "The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules

---

[1] Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, wilfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury * * *.

[2] "CONDUCT AND DUTIES; DISBARMENT AND DISCIPLINE

"The standards of conduct and duties of members of the bar of the District shall be those prescribed by Chapter 610, Code of Iowa 1950, by the oath set forth in Rule 1 hereof, and by the Canons of Professional Ethics of the American Bar Association, and amendments thereto.

"For violation of such standards of conduct and duties any member of the bar of the District for good cause shown, and after an opportunity has been given to be heard, may be disbarred, suspended from practice for a definite time, reprimanded, or subjected to such other discipline as the court may deem proper.

"Whenever it is made to appear to the court that any member of its bar has been disbarred or suspended from practice, or convicted of a felony in any other court he shall be suspended forthwith from practice before this court, and, unless upon notice mailed to him at his last known address, he shows good cause to the contrary within fifteen days, there shall be entered an order of disbarment, or of suspension for such time as the court shall fix.

"Any person who before his admission to the bar of this court, or during his disbarment or suspension, exercises in the District in any action or proceeding pending in the court any of the privileges of a member of the bar, or who pretends to be entitled so to do, shall be guilty of contempt of court, and shall subject himself to appropriate punishment therefor."

shall be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court."

Rule 83 of the Federal Rules of Civil Procedure is as follows:

"RULES OF DISTRICT COURTS:

"Each district court by action of a majority of the judges thereof may from time to time make and amend rules governing its practice not inconsistent with these rules. Copies of rules and amendments so made by any district court shall upon their promulgation be furnished to the Supreme Court of the United States. In all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules."

Thus Congress and the Supreme Court of the United States have recognized the necessity of broad rule making powers of the courts to enable them to prescribe complete and uniform modes of procedure. It appears, however, that Sec. 1621 and Rule 83, supra, were intended only to cover matters of practice and procedure. Likewise amended Rule 3 was promulgated for the purpose of determining the fitness of lawyers falling within its [fol. 12] terms, to participate in certain actions before the court. Following the oral hearings at which the defendant Hvass testified, the Court determined that he had not made a satisfactory showing under Rule 3 and he was denied the right to participate in the Wyrum and Lash cases. Without question a United States District Court has the right to determine the fitness of attorneys who may practice in such court. See the recent case of In re Wasserman, —— F.2d ——, 9th Cir., October 2, 1956. However, after Rule 3 had served its purpose and the court denied the defendant Hvass the right to participate in the Wyrum and Lash cases, the United States now seeks to prosecute him for perjury based upon the testimony given by him at these hearings. In seeking to do so, it appears to me that the United States is going far beyond what Congress intended in granting the rule making power to the courts.

The essential elements of the crime of perjury as defined in 18 U.S.C.A. Sec. 1621 are (1) an oath authorized by a law of the United States, (2) taken before a competent tribunal, officer or person, and (3) a false statement wilfully made as to facts material to the hearing. United States v. Debrow, 346 U.S. 374. Under point one above, we recognize that generally speaking a rule of court has the force of law. In re Giannini, Inc., 90 F.2d 445; Galveston Dry Dock & Construction Co. v. Standard Dredging Co., 40 F.2d 442. We are here confronted with an unusual situation, namely, a perjury indictment, predicated upon a rule of court that is in itself rather unique and unusual. It gives to the court the discretion to determine when the attorney shall be required to make a satisfactory showing in regard to Rule 8, supra, and the further discretion to place the witness under oath. The purpose of the rule was accomplished when Hvass [fol. 13] was denied the right to participate in the Wyrum and Lash cases and if disciplinary action against the defendant Hvass is deemed advisable such action should be instituted in the regular manner.

The defendant urges that Rule 3 is invalid upon several grounds and contends that his motion to dismiss the indictment must be sustained for this reason. In my opinion it is not necessary for me to pass upon this question. I simply hold that Rule 3, under which the defendant took his oath, is not such a law of the United States as was intended by Congress to support an indictment for perjury.

The defendant's motion to dismiss will be granted. Defendant's counsel may prepare and submit a formal order dismissing the indictment, and as to all four counts thereof.

Dated this 20th day of December, 1956.

BY THE COURT:

/s/ George T. Mickelson
United States District Judge

By Assignment to the Northern District of Iowa

[fol. 14]

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CENTRAL DIVISION

UNITED STATES OF AMERICA, *Plaintiff*,

v.

CHARLES T. HVASS, *Defendant*.

ORDER DISMISSING INDICTMENT—Dec. 27, 1956

The defendant's motion to dismiss the indictment having been noticed for hearing and heard on November 13, 1956, the plaintiff appearing by Mr. F. E. Van Alstine, United States Attorney, and Mr. T. G. Gilinsky, Assistant United States Attorney, and the defendant by Messrs. Warren B. King and M. E. Rawlings, their respective attorneys, and the Court being advised in the premises,

IT IS ORDERED, that the motion be granted and judgment entered dismissing the indictment, and all four counts thereof, for failure to state facts sufficient to constitute an offense against the United States.

BY THE COURT:

/s/ George T. Mickelson
United States District Judge

By Assignment to the Northern
District of Iowa

Dated: December 27, 1956.

(File Endorsement Omitted)

[fol. 15]

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CENTRAL DIVISION

STATEMENT OF DOCKET ENTRIES

1. Indictment for violation of Sec. 1621, Title 18, United States Code—Counts I, II, III, IV: Unlawfully, knowingly and contrary to the oath taken by

him, administered by the Clerk of the United States District Court at a hearing in a matter pending before said court in which a law of the United States authorizes an oath to be administered, stating material matters which he did not believe to be true.

Filed March 20, 1956.

2. Court Order providing that all proceedings in this case will be handled by the Hon. George T. Mickelson, U. S. District Judge, District of South Dakota, by assignment to this District.

Filed March 21, 1956.

3. Defendant's Notice of Motion and Motion for an order staying proceedings.

Filed May 24, 1956.

4. Court Order providing that all further proceedings in this matter be stayed pending a decision of the United States Court of Appeals for the Eighth Circuit in the case of William H. DeParcq v. United States District Court for the Southern District of Iowa and The Honorable William F. Riley, as Judge Thereof, Civil No. 15,507, and pending further order of Court.

Filed May 25, 1956.

5. Defendant's Motion to Dismiss the Indictment.

Filed November 13, 1956.

6. Stipulation of parties that the hearing upon defendant's motion to dismiss indictment shall be heard and argued in open Court at Sioux City, Iowa, beginning at 10:00 o'clock in the forenoon of the 13th day of November, 1956, and submitted as the Court may direct; and Order of Court approving said Stipulation.

Filed November 13, 1956.

[fol. 16] 7. Hearing on defendant's Motion to Dismiss the Indictment before the Hon. George T. Mickelson, United States District Judge, by Assign-

ment to the Northern District of Iowa, held at Sioux City, Iowa,

On November 13, 1956.

8. Memorandum Decision signed on December 20, 1956, by the Hon. George T. Mickelson, United States District Judge, providing that defendant's Motion to Dismiss will be granted; that defendant's counsel may prepare and submit a formal order dismissing the indictment, and as to all four counts thereof.

Filed Dec. 21, 1956, and entered in Minutes Record No. 19, Pages 160-66.

9. Court Order signed by the Hon. George T. Mickelson, United States District Judge on December 27, 1956, that the defendant's Motion to dismiss the indictment be granted and judgment entered dismissing the indictment and all four counts thereof, for failure to state facts sufficient to constitute an offense against the United States.

Filed Dec. 27, 1956, and entered in Minutes Record No. 19, Page 167.

10. Plaintiff's Notice of Appeal to the United States Court of Appeals, Eighth Circuit, from the ruling and judgment in this case.

Filed in duplicate January 16, 1957.

11. Clerk's Certificate of mailing of copies of plaintiff's Notice of Appeal to the United States Court of Appeals, Eighth Circuit, on January 16, 1957, to counsel of record for defendant.

Filed January 16, 1957.

12. Letter from Mr. E. E. Koch, Clerk, United States Court of Appeals for the Eighth Circuit, St. Louis, Missouri, showing that the appeal in this case was docketed in said Court on January 22, 1957, under No. 15710.

Filed January 24, 1957.

13. Plaintiff's Notice of Appeal to the Supreme Court of the United States from the Order of December 27, 1956, dismissing the indictment which charged perjury in violation of 18, U.S.C. 1621; and attached Certificate of Service by Mail, signed by F. E. Van Alstine, U. S. Attorney, showing that copies of said Notice of Appeal to the Supreme Court of the United States were mailed on January 24, 1957, to counsel of record for appellee, as follows: Warren B. King, King & McGregor, 945 Northwestern Bank Building, Minneapolis 2, Minnesota; Mr. M. E. Rawlings, 561 Orpheum-Electric Building, Sioux City 1, Iowa.

Filed January 24, 1957.

Attest: /s/ Lee McNeely
Clerk

[SEAL]

Dated: February 9, 1957.

[fol. 17] IN THE

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CENTRAL DIVISION

Criminal No. 2358

UNITED STATES OF AMERICA, *Plaintiff*,

v.

CHARLES T. HVASS, *Defendant*.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed January 24, 1957

I. Notice is hereby given that the United States appeals to the Supreme Court of the United States from the order of December 27, 1956, dismissing the indictment which charged perjury in violation of 18 U.S.C. 1621.

The appeal is taken pursuant to 18 U.S.C. 3731.

II. The Clerk will please prepare a transcript of the record in this cause for transmission to the Clerk of the Supreme Court of the United States and include in said transcript the following:

1. Transcript of docket entries.
2. The indictment.
3. Motion to dismiss the indictment.
4. Memorandum decision of the District Court filed December 21, 1956.
5. Order dismissing the indictment filed December 27, 1956.
6. Notice of appeal.

[fol. 18] III. The following question is presented by this appeal:

Whether false testimony under oath in an examination conducted pursuant to a rule of the District Court was in a "case in which a law of the United States authorizes an oath to be administered" so as to come within the purview of the federal perjury statute, 18 U.S.C. 1621.

/s/ F. E. Van Alstine
F. E. Van Alstine
United States Attorney
Northern District of Iowa

[fol. 19] Certificate of Service By Mail

(Omitted in Printing)

[fol. 20] Clerk's Certificate to foregoing Transcript omitted in printing.

SUPREME COURT OF THE UNITED STATES

(Title Omitted)

Order Postponing Jurisdiction—June 3, 1957

Appeal from the United States District Court for the Northern District of Iowa.

The statement of jurisdiction in this case having been submitted and considered by the Court, further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits. The case is transferred to the summary calendar.

June 3, 1957

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FILED
MAR 21 1957
JOHN T. FEY, Clerk

No. 92

In the Supreme Court of the United States

OCTOBER TERM, 1956

UNITED STATES OF AMERICA, APPELLANT

v.

CHARLES T. HVASS

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA, CENTRAL DIVISION

JURISDICTIONAL STATEMENT

J. LEE RANKIN,
Solicitor General,
WARREN OLNEY III,
Assistant Attorney General,
BEATRICE ROSENBERG,
ALBERT M. CHRISTOPHER,
Attorneys,
Department of Justice,
Washington 25, D. C.

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CITATIONS

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. —

UNITED STATES OF AMERICA, APPELLANT

v.

CHARLES T. HVASS

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA, CENTRAL DIVISION

JURISDICTIONAL STATEMENT

OPINION BELOW

The memorandum decision of the District Court (App. A, *infra*, pp. 9-15) is not reported.

JURISDICTION

On December 27, 1956, the United States District Court for the Northern District of Iowa entered an order (App. B, *infra*, p. 16) dismissing the indictment for perjury on the ground that sworn testimony given in a proceeding conducted under local rule of court to determine an attorney's fitness to prac-

tice before the court was not testimony in a "case in which a law of the United States authorizes an oath to be administered," within the meaning of the federal perjury statute (18 U.S.C. 1621). A notice of appeal to this Court was filed in the District Court on January 24, 1957. The jurisdiction of this Court to review on direct appeal an order dismissing an indictment, based on a construction of the statute upon which the indictment rests, is conferred by 18 U.S.C. 3731.

STATUTE AND RULE INVOLVED

18 U.S.C. 1621 provides in pertinent part:

> Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury
> * * *

Local Rule 3 of the United States District Courts for the Northern and Southern Districts of Iowa provides:

> All attorneys residing outside of the State of Iowa and having civil matters in the court shall associate with them a resident attorney on whom notice may be served and who shall have the authority to act for and on behalf of the client in all matters, including pre-trial conferences and the trial of the case. Such resident attorney shall be a member of the bar of the District, shall sign the

first pleading filed and continue in the matter unless other qualified resident counsel be substituted. Non-resident attorneys who have so associated with them a resident attorney shall be permitted to participate in a particular case upon satisfactory showing of good moral character.

Provided further that where the action is one to recover damages for personal injuries sustained in Iowa by one who at the time was a resident of Iowa or the action is one to recover damages for the death of a resident of Iowa resulting from personal injuries sustained in Iowa, the Court may on its own motion, or on motion of a member of the bar of either District, before permitting a nonresident attorney to participate in the case, require a satisfactory showing that the connection of the said attorney, or the firm or attorney with which he is associated, was not occasioned or brought about in violation of the standards of conduct specified in Rule 8 hereof. The Court as a part of said showing may require the plaintiff and the said attorney to appear and be examined under oath.

QUESTION PRESENTED

Whether a willful false statement of a material fact, made by an attorney under oath during a district court's examination into his fitness to practice before it, constitutes perjury within the meaning of 18 U.S.C. 1621.

STATEMENT

Local Rule 3 of the United States District Courts for the Northern and Southern Districts of Iowa provides a method by which the court may require a satisfactory showing of acceptable standards of conduct by non-

resident attorneys before permitting them to appear in Iowa district court cases involving claims for personal injuries or unlawful death sustained in Iowa by residents of Iowa. The rule provides that, as a part of such showing, the plaintiff and the non-resident attorney may be required to appear and be examined under oath.

Pursuant to this rule, the United States District Court for the Northern District of Iowa entered an order requiring the non-resident attorneys interested in two Iowa negligence cases to appear and be examined under oath if they wished to participate in those cases. Appellee Hvass, a non-resident attorney from Minneapolis, Minnesota, appeared and was examined under oath by the United States Attorney. At the conclusion of the hearing, the court found that he had not made a satisfactory showing under Local Rule 3, denied his application to participate in the two cases, and struck the appearance of his law firm as attorneys for the plaintiff in each case.

On March 20, 1956, a four-count indictment was returned in the same district court, charging Hvass with violation of the federal perjury statute, 18 U.S.C. 1621, *supra*, p. 2. Each count charged him with giving false testimony at the admission hearing in response to questions bearing on champerty and maintenance. A motion to dismiss the indictment was sustained in a memorandum decision holding that the rule under which Hvass took his oath "is not such a law of the United States as was intended by Congress to support an indictment for perjury." Although the court agreed that "[w]ithout question a United States District Court has the right to determine the fitness of attorneys who

may practice in such court," it held that once an attorney's fitness had been determined the purpose of Rule 3 had been served and testimony adduced at the hearing could not later be used to support an indictment for perjury. "In seeking to do so," the District Judge stated, "it appears to me that the United States is going far beyond what Congress intended in granting the rule making power to the courts."

THE QUESTION IS SUBSTANTIAL

1. The court below has held in substance that the sanction of the federal perjury statute (18 U.S.C. 1621, *supra*, p. 2) is inapplicable when a witness is examined under oath in an ancillary matter or proceeding. The court did not doubt that an inquiry into the fitness of an attorney to practice before the court was within the realm of judicial competence. It was of the view, however, that testimony which is not part of a trial proper is not punishable under the statute, however false it may be. It is apparent that the limiting effect of such a precedent may make itself felt in numerous situations; the district courts have frequent occasion to conduct hearings or proceedings of an ancillary nature, both under their rules and in the exercise of their inherent or implied powers. If witnesses examined in such proceedings are not subject to the normal penalties which may be imposed for the giving of false testimony, it can hardly be denied that there is a serious limitation—one hitherto unsuspected—upon the capacity of the district courts to conduct their business effectively.

We believe that the decision rests upon an unduly narrow and an unwarranted construction of the perjury statute—specifically, of the language which re-

quires the case to be one "in which a law of the United States authorizes an oath to be administered." It is true that there is no Act of Congress which declares that a district court in examining into the fitness of attorneys to practice before it (or into other similar matters) may put witnesses under oath. It is no less true, however, that there is no statute or federal rule providing in terms that a witness who testifies at a district court trial shall be (or may be) put under oath. The power of the court to swear the witness called to testify in a matter within the competence of the court is an inherent attribute of the judicial power and hence one which has never been deemed to require elucidation by statute. Note, for example, that the Federal Rules of Civil Procedure, although they make no provision for administration of an oath to a witness before the court, specifically confer upon masters power to put witnesses under oath. Rule 53(c). See 70 *Corpus Juris* 482, note 30(h), for state cases discussing a court's inherent power to administer an oath to a witness.

The history of the requirement that a witness must take an oath in order to give testimony goes back to early civilizations and has a long history at common law. *Wigmore on Evidence,* 3d ed., Sec. 1815. "The oath used to be regarded as a summoning of Divine vengeance upon false swearing, whereby when the spectators see the witness standing unharmed they know that the Divine judgment has pronounced him to be a truth-teller. But it is now conceived as a method of reminding the witness strongly of the Divine punishment somewhere in store for false swearing, and thus of putting him in a frame of mind calculated to speak only the truth as he saw it." *Id.,* Sec. 1816. For centuries Anglo-American law has remained faithful to

the precept that "for *all testimonial statements made in court* the oath is a requisite (*id.*, Sec. 1824), the only qualification being that it is now generally permitted, both in English and American jurisdictions, to substitute a solemn affirmation for an oath. *Id.*, Sec. 1828; Federal Rules of Civil Procedure, Rule 43(d).

We submit, in brief, that the law of the United States which permits a court to put a witness under oath is found in the common law and in such constitutional and statutory law as confers the judicial power upon a designated tribunal. Since the authority is implicit in the judicial power, nothing more explicit than the conferral of that power is required.

So viewed, the question in the instant case is whether the inquiry made was within the scope of the judicial power or competence. On this point, the court below had no doubt; it held that "without question" the district courts possess power to examine into the fitness of attorneys to practice before them. App. A, *infra*, p. 14. This holding, we think, was plainly correct. *Ex parte Secombe*, 19 How. 9, 13; *Atchison, Topeka and Santa Fe Railway Co.* v. *Jackson*, 235 F. 2d 390, 393 (C.A. 10).

2. For the reasons indicated above, we are of the view that the district court was authorized by "a law of the United States" to administer the oath, entirely apart from its local rule of court. We also believe that the local rule (which, it should be noted, provides for examination under oath, *supra*, p. 3) must be considered "a law of the United States" within the meaning of the perjury statute, since it represents a proper and permissible exercise of the rule-making power delegated by Congress. 28 U.S.C. 2071 broadly states: "The

Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court." 28 U.S.C. 1654 provides: "In all courts of the United States the parties may plead and conduct their own cases personally or by counsel, as, *by the rules of such courts,* respectively, are permitted to manage and conduct causes therein" (emphasis added). See, also, Federal Rules of Civil Procedure, Rule 83. Since the local rule of court had the force of law, it sustains the perjury indictment herein. Cf. *United States* v. *Howard,* 352 U.S. 212.

CONCLUSION

Whether the universal power of courts to put witnesses under oath—a power inherent in the judicial function as we know it—extends to ancillary matters within the judicial competence, as well as to proceedings which are conventional trials, is a question of substantial importance in the working of the judicial system. Accordingly, it is respectfully submitted that this Court should note probable jurisdiction of the appeal.

J. LEE RANKIN,
Solicitor General.

WARREN OLNEY III,
Assistant Attorney General.

BEATRICE ROSENBERG,
ALBERT M. CHRISTOPHER,
Attorneys.

MARCH, 1957.

APPENDIX A

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA. CENTRAL DIVISION

Criminal No. 2358

UNITED STATES OF AMERICA, PLAINTIFF

v.

CHARLES T. HVASS, DEFENDANT

MEMORANDUM DECISION

Mr. F. E. Van Alstine, United States Attorney, and Mr. T. G. Gilinsky, Assistant United States Attorney, of Sioux City, Iowa, appeared in behalf of the plaintiff;

and

Mr. Warren B. King, of King & MacGregor, of Minneapolis, Minnesota, and Mr. M. E. Rawlings, of Sioux City, Iowa, appeared in behalf of the defendant.

This matter is before the Court upon the defendant's motion to dismiss the indictment on the ground that the same does not state facts sufficient to constitute an offense against the United States.

The defendant, Charles T. Hvass, is an attorney with his office in Minneapolis, Minnesota, and is a member in good standing of the bars of the states of Minnesota and Texas, and has been admitted to practice before the United States District Court for the District of Minnesota, and the United States Court of Appeals for the Eighth Circuit. Hvass represented injured workmen in two suits which were filed in this court, Wyrum v. Mason City & Clear Lake Railroad Co.,

Civil No. 644, and Lash v. Chicago Great Western Railway Co., Civil No. 663. At the time those suits were filed in this court, Local Rule 3 of the Northern and Southern Districts of Iowa provided as follows:

> "All attorneys residing outside of the state of Iowa and having civil matters in the court shall associate with them a resident attorney on whom notice may be served and who shall have the authority to act for and on behalf of the client in all matters, including pretrial conferences and the trial of the case. Such resident attorney shall be a member of the bar of the District, shall sign the first pleading filed and continue in the matter unless other qualified resident counsel be substituted. Non-resident attorneys who have so associated with them a resident attorney shall be permitted to participate in a particular case upon satisfactory showing of good moral character."

The evident purpose of the rule is to assure the court that when out of state attorneys appear as counsel in any case, that there will be no delays for hearings on motions, pre-trial conferences and other matters which may arise during the trial, and so that service of papers may be accomplished locally at any stage of the proceedings. A similar rule will be found in the rules of most United States District Courts.

Subsequent to the commencement of the Wyrum and Lash cases, and on August 31, 1955, the judges of the Northern and Southern Districts of Iowa entered an order amending Rule 3 by adding thereto the following proviso:

> "Provided further that where the action is one to recover damages for personal injuries sustained in Iowa by one who at the time was a resident of

> Iowa or the action is one to recover damages for the death of a resident of Iowa resulting from personal injuries sustained in Iowa, the court may on its own motion, or on motion of a member of the bar of either District, before permitting a non-resident attorney to participate in the case, require a satisfactory showing that the connection of the said attorney, or the firm or attorney with which he is associated, was not occasioned or brought about in violation of the standards of conduct specified in Rule 8 hereof. The court as a part of said showing may require the plaintiff and the said attorney to appear and be examined under oath."

It is this amended Rule 3 with which we are now concerned. The amendment became effective on October 1, 1955, as to actions then pending or thereafter commenced.

On October 3, 1955, the court entered an order fixing October 12, 1955, as the date for non-resident attorneys in the Wyrum and Lash cases to appear, if they wished to participate in those actions, and be examined under oath in regard to matters within the scope of amended Rule 3. The defendant Hvass did appear, and was examined under oath by the United States Attorney. Administration of the oath to Hvass was not a part of any judicial proceeding in the Wyrum and Lash cases, but rather was a part of an administrative proceeding by which the court sought to determine whether Hvass should be permitted to participate as an attorney in these cases. Two further hearings were held, and witnesses subpoenaed both by the United States and by the defendant Hvass, were examined and cross-examined. Thereafter, on November 1, 1955, the court entered an order finding that the injuries for which recovery was sought in each case were sustained in the

State of Iowa by residents of Iowa and that "the applicant has not made satisfactory showing of the matters which must be satisfactorily shown under said Local Rule 3." Thus the court denied the application of Hvass to participate in the two cases and struck the appearance of the firm of Hvass, Weisman, Peterson, King and Schwappach as attorneys for plaintiff in each case.

On March 20, 1956, the present indictment was returned, charging the defendant Hvass with the crime of perjury under four separate counts in violation of 18 U.S.C.A. Sec. 1621.[1] The indictment charges under each count thereof that the alleged false testimony was given under and pursuant to the provisions of Rule 3, supra, and Rule 8,[2] Local Rules of the United States District Court, Northern District of Iowa.

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[1] Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, wilfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty or perjury * * *.

[2] "CONDUCT AND DUTIES; DISBARMENT AND DISCIPLINE

"The standards of conduct and duties of members of the bar of the District shall be those prescribed by Chapter 610, Code of Iowa 1950, by the oath set forth in Rule 1 hereof, and by the Canons of Professional Ethics of the American Bar Association, and amendments thereto.

"For violation of such standards of conduct and duties any member of the bar of the District for good cause shown, and after an opportunity has been given to be heard, may be disbarred, suspended from practice for a definite time, reprimanded, or subjected to such other discipline as the court may deem proper.

"Whenever it is made to appear to the court that any member of its bar has been disbarred or suspended from practice, or convicted of a felony in any other court he shall be suspended forthwith from practice before this court, and, unless upon notice mailed to him at his last known address, he shows good cause to the con-

Let us first consider briefly the rule making power of a United States District Court. Such rule making power is found in 28 U.S.C.A. Sec. 2071:

> "The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court."

Rule 83 of the Federal Rules of Civil Procedure is as follows:

> "RULES OF DISTRICT COURTS:
>
> "Each district court by action of a majority of the judges thereof may from time to time make and amend rules governing its practice not inconsistent with these rules. Copies of rules and amendments so made by any district court shall upon their promulgation be furnished to the Supreme Court of the United States. In all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules."

Thus Congress and the Supreme Court of the United States have recognized the necessity of broad rule making powers of the courts to enable them to prescribe complete and uniform modes of procedure. It appears, however, that Sec. 1621 and Rule 83, supra, were in-

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trary within fifteen days, there shall be entered an order of disbarment, or of suspension for such time as the court shall fix.

"Any person who before his admission to the bar of this court, or during his disbarment or suspension, exercises in the District in any action or proceeding pending in the court any of the privileges of a member of the bar, or who pretends to be entitled so to do, shall be guilty of contempt of court, and shall subject himself to appropriate punishment therefor."

tended only to cover matters of practice and procedure. Likewise amended Rule 3 was promulgated for the purpose of determining the fitness of lawyers falling within its terms, to participate in certain actions before the court. Following the oral hearings at which the defendant Hvass testified, the Court determined that he had not made a satisfactory showing under Rule 3 and he was denied the right to participate in the Wyrum and Lash cases. Without question a United States District Court has the right to determine the fitness of attorneys who may practice in such court. See the recent case of In re Wasserman, — F. 2d —, 9th Cir., October 2, 1956. However, after Rule 3 had served its purpose and the court denied the defendant Hvass the right to participate in the Wyrum and Lash cases, the United States now seeks to prosecute him for perjury based upon the testimony given by him at these hearings. In seeking to do so, it appears to me that the United States is going far beyond what Congress intended in granting the rule making power to the courts.

The essential elements of the crime of perjury as defined in 18 U.S.C.A. Sec. 1621 are (1) an oath authorized by a law of the United States, (2) taken before a competent tribunal, officer or person, and (3) a false statement wilfully made as to facts material to the hearing. United States v. Debrow, 346 U.S. 374. Under point one above, we recognize that generally speaking a rule of court has the force of law. In re Giannini, Inc., 90 F. 2d 445; Galveston Dry Dock & Construction Co. v. Standard Dredging Co., 40 F. 2d 442. We are here confronted with an unusual situation, namely, a perjury indictment, predicated upon a rule of court that is in itself rather unique and unusual. It gives to the court the discretion to determine when the attorney shall be required to make a satisfactory showing in regard to Rule 8, supra, and the further discretion

to place the witness under oath. The purpose of the rule was accomplished when Hvass was denied the right to participate in the Wyrum and Lash cases and if disciplinary action against the defendant Hvass is deemed advisable such action should be instituted in the regular manner.

The defendant urges that Rule 3 is invalid upon several grounds and contends that his motion to dismiss the indictment must be sustained for this reason. In my opinion it is not necessary for me to pass upon this question. I simply hold that Rule 3, under which the defendant took his oath, is not such a law of the United States as was intended by Congress to support an indictment for perjury.

The defendant's motion to dismiss will be granted. Defendant's counsel may prepare and submit a formal order dismissing the indictment, and as to all four counts thereof.

Dated this 20th day of December, 1956.

By the Court:

GEORGE T. MICKELSON,
United States District Judge,
By Assignment to the Northern
District of Iowa.

APPENDIX B

UNITED STATE DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA, CENTRAL DIVISION

Criminal No. 2358

UNITED STATES OF AMERICA, PLAINTIFF

vs.

CHARLES T. HVASS, DEFENDANT

ORDER

The defendant's motion to dismiss the indictment having been noticed for hearing and heard on November 13, 1956, the plaintiff appearing by Mr. F. E. Van Alstine, United States Attorney, and Mr. T. G. Gilinsky, Assistant United States Attorney, and the defendant by Messrs. Warren B. King and M. E. Rawlings, their respective attorneys, and the court being advised in the premises,

IT IS ORDERED, that the motion be granted and judgment entered dismissing the indictment, and all four counts thereof, for failure to state facts sufficient to institute an offense against the United States.

By the Court:

(S.) GEORGE T. MICKELSON,
United States District Judge,
District of Iowa.

Dated December 27, 1956.

Filed in the District Court December 27, 1956.

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No. 92

In the Supreme Court of the United States

OCTOBER TERM, 1957

UNITED STATES OF AMERICA, *Appellant*

v.

CHARLES T. HVASS

On Appeal from the United States District Court for the Northern District of Iowa Central Division

---

BRIEF FOR THE UNITED STATES

J. LEE RANKIN,
Solicitor General,

WARREN OLNEY III,
Assistant Attorney General,

BEATRICE ROSENBERG,
ALBERT M. CHRISTOPHER,
Attorneys,
Department of Justice,
Washington 25, D. C.

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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 92

UNITED STATES OF AMERICA, *Appellant*

v.

CHARLES T. HVASS

On Appeal from the United States District Court for the Northern District of Iowa Central Division

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BRIEF FOR THE UNITED STATES

OPINION BELOW

The memorandum decision of the District Court (R. 5-10) is not reported.

JURISDICTION

On December 27, 1956, the United States District Court for the Northern District of Iowa entered an order (R. 11) dismissing an indictment for perjury on the ground that sworn testimony given in a pro-

ceeding conducted under a local rule of court to determine an attorney's fitness to practice before the court was not testimony in a "case in which the law of the United States authorizes an oath to be administered" within the meaning of the federal perjury statute (18 U.S.C. 1621). A notice of appeal to this Court was filed in the district court on January 24, 1957 (R. 14). On April 23, 1957, appellee moved to affirm the judgment below. On June 3, 1957, this Court ordered (R. 15) that "further consideration of the question of jurisdiction [be] postponed to the hearing of the case on the merits." The jurisdiction of this Court to review on direct appeal an order dismissing an indictment, based on a construction of the statute upon which the indictment rests, is conferred by 18 U.S.C. 3731.

STATUTE AND RULE INVOLVED

18 U.S.C. 1621 provides in pertinent part:

> Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury * * *.

Local Rule 3 of the United States District Courts for the Northern and Southern Districts of Iowa provides:

> All attorneys residing outside of the State of Iowa and having civil matters in the court shall associate with them a resident attorney on whom notice may be served and who shall have the au-

thority to act for and on behalf of the client in all matters, including pre-trial conferences and the trial of the case. Such resident attorney shall be a member of the bar of the District, shall sign the first pleading filed and continue in the matter unless other qualified resident counsel be substituted. Non-resident attorneys who have so associated with them a resident attorney shall be permitted to participate in a particular case upon satisfactory showing of good moral character.

Provided further that where the action is one to recover damages for personal injuries sustained in Iowa by one who at the time was a resident of Iowa or the action is one to recover damages for the death of a resident of Iowa resulting from personal injuries sustained in Iowa, the Court may on its own motion, or on motion of a member of the bar of either District, before permitting a nonresident attorney to participate in the case, require a satisfactory showing that the connection of the said attorney, or the firm or attorney with which he is associated, was not occasioned or brought about in violation of the standards of conduct specified in Rule 8 hereof. The Court as a part of said showing may require the plaintiff and the said attorney to appear and be examined under oath.

QUESTION PRESENTED

Whether a willfully false statement of a material fact, made by an attorney under oath during a district court's examination into his fitness to practice before it, constitutes perjury within the meaning of 18 U.S.C. 1621.

STATEMENT

Local Rule 3 of the United States District Courts for the Northern and Southern Districts of Iowa provides a method by which the court may require a satisfactory showing of acceptable standards of conduct by non-resident attorneys before permitting them to appear in Iowa district court cases involving claims for personal injuries or unlawful death sustained in Iowa by residents of Iowa. The rule provides that, as a part of such showing, the plaintiff and the non-resident attorney may be required to appear and be examined under oath.

Pursuant to this rule, the United States District Court for the Northern District of Iowa entered an order requiring the non-resident attorneys interested in two Iowa negligence cases to appear and be examined under oath if they wished to participate in those cases (R. 7). Appellee Hvass, a non-resident attorney from Minneapolis, Minnesota, appeared and was examined under oath by the United States Attorney. Three hearings were held and at their conclusion the court entered an order stating that Hvass had not made a satisfactory showing under Local Rule 3. The judge accordingly denied Hvass' application to participate in the two cases and struck the appearance of his law firm as attorneys for the plaintiff in each case (R. 7).

On March 20, 1956, a four-count indictment was returned in the same district court, charging Hvass with violation of the federal perjury statute, 18 U.S.C. 1621, *supra*, p. 2. Each count charged him with giving false testimony under oath at the admission hearing in response to questions bearing on champerty and maintenance (R. 1-4). The district court, speaking through

a judge from a different district sitting by designation (R. 12), sustained a motion to dismiss the indictment. The memorandum decision below holds that the rule under which Hvass took his oath "is not such a law of the United States as was intended by Congress to support an indictment for perjury". The court recognized "that generally speaking a rule of court has the force of law", and agreed that "[w]ithout question a United States District Court has the right to determine the fitness of attorneys who may practice in such court". It reasoned, however, that the proceeding was administrative in nature; that, once an attorney's fitness had been determined, the purpose of Rule 3 had been served; and consequently that testimony adduced at the hearing could not later be used to support an indictment for perjury. "In seeking to do so," the District Judge stated, "it appears to me that the United States is going far beyond what Congress intended in granting the rule-making power to the courts" (R. 7, 9-10).

SUMMARY OF ARGUMENT

A condition of liability under the federal perjury statute is that the false testimony be given in a case "in which a law of the United States authorizes an oath to be administered" (18 U.S.C. 1621). In this case, the court below held that a local rule of court, although it in terms authorized the examination under oath which gave rise to the charge of perjury, did not have sufficient force of law to bring the perjury statute into play. On that basis, it dismissed the indictment. The judgment of dismissal, since it rests on a determination as to the reach of the perjury statute upon which the indictment is founded, is appealable to this Court under the Criminal Appeals Act, 18 U.S.C. 3731.

A. There is no question that the proceeding in which the alleged false testimony was given was an authorized one in the sense that it was within the judicial power. The federal courts may determine and apply appropriate qualifications for admission to practice. Moreover, there is no challenge to the fairness of the procedures which were followed.

B. Apart from the local rule of court, authority to administer an oath in the conduct of an admission proceeding may be derived from the statute generally authorizing judges to administer oaths (28 U.S.C. 459). The failure of this statute to specify individually the various types of proceedings in which oaths may be administered cannot justify an inference that judges may administer oaths in the conduct of ordinary trials but not in other proceedings which fall within the court's jurisdiction. As the cases show, the inherent power of judges to administer oaths, long recognized at common law and confirmed by the federal statute, extends to all matters and proceedings within the tribunal's competence.

C. In addition, the local rule of court, which specifically authorized the administration of the oath, has the force of a law of the United States, for it represents a valid exercise of the rule-making authority conferred on the district courts by Congress. A "law of the United States" includes a rule or regulation promulgated by lawful authority. The quoted phrase has no extraordinary or specially restrictive meaning as used in the perjury statute. As this Court has stated, the perjury laws apply where the administration of an oath is authorized "either expressly by an act of Congress or by an authorized regulation." *United States* v. *Smull*, 236 U.S. 405, 409.

ARGUMENT

INTRODUCTION

This Court has determined that the essential elements of the crime of perjury, as defined in 18 U.S.C. 1621 (*supra*, p. 2), are "(1) an oath authorized by a law of the United States, (2) taken before a competent tribunal, officer or person, and (3) a false statement wilfully made as to facts material to the hearing". *United States* v. *Debrow*, 346 U.S. 374, 376. We are here concerned with the first requirement. The holding of the court below was that a local rule regulating the participation of non-resident attorneys and authorizing their preliminary examination under oath (*supra*, pp. 2-3) did not have sufficient force of law to bring the federal perjury statute (18 U.S.C. 1621, *supra*, p. 2) into play. On that basis, it dismissed the indictment.[1]

Before turning to the merits, we note our reasons for believing that this Court plainly has jurisdiction under the Criminal Appeals Act, 18 U.S.C. 3731. The decision below determined the reach of the perjury statute upon which the indictment was founded. It determined, otherwise stated, that the words "a law of the United States", as used in 18 U.S.C. 1621, do not embrace a rule of court of the type here involved. There is in this case no claim or suggestion that the indictment is defective as a pleading. The only issue is the correct interpretation of the perjury statute.

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[1] The precise words of the District Judge are as follows (R. 10): "I simply hold that Rule 3, under which the defendant took his oath, is not such a law of the United States as was intended by Congress to support an indictment for perjury."

Indeed, appellee concedes this Court's jurisdiction in his motion to affirm, in which he states (p. 5):

> It is recognized, of course, that a decision that a particular administrative regulation is or is not a "law of the United States" within the meaning of the perjury statute is, technically, a construction of the statute, and gives jurisdiction to this Court under the Criminal Appeals Act.

As this Court has definitively stated, when "the District Court holds that the indictment, not merely because of some deficiency in pleading but with respect to the substance of the charge, does not allege a violation of the statute upon which the indictment is founded, that is necessarily a construction of that statute," and the case is one for direct appeal to this Court. *United States* v. *Borden Co.*, 308 U.S. 188, 193.

THE OATH ADMINISTERED TO APPELLEE WAS AUTHORIZED BY A LAW OF THE UNITED STATES WITHIN THE MEANING OF THE FEDERAL PERJURY STATUTE

A. It is within the power of a district court to determine the fitness of an attorney to practice before it.

The first step in showing that the district court had power to administer a binding oath to appellee is to establish that the proceeding in which the alleged false swearing took place was an authorized one. However, the proposition that it is within the power of a district court to determine the fitness of attorneys to practice before it is scarcely open to doubt (the court below agreed that the existence of such power was "without question," R. 7) and may be treated summarily. As this Court has unequivocally declared, *Ex parte Garland*, 4 Wall. 333, 378-379, a proceeding to determine whether one shall be admitted to practice before a fed-

eral court "is the exercise of judicial power, and has been so held in numerous cases."[2] See, also, *Randall* v. *Brigham*, 7 Wall. 523, 535; *Ex parte Secombe*, 19 How. 9, 15. Compare cases involving review by this Court of admission proceedings in the States, *e. g.*, *In re Summers*, 325 U.S. 561; *Schware* v. *Board of Bar Examiners*, 353 U.S. 232, *Konigsberg* v. *State Bar of California*, 353 U.S. 252.[3]

Moreover, there is no challenge to the procedures which were followed. Initially, the district court entered an order (see R. 7) fixing a date for appellee to appear and be examined under oath pursuant to the

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[2] The opinion in *Garland* also declares (*ibid.*) that the conduct of such proceedings "is not the exercise of a mere ministerial power." We do not read the statement of the court below that the alleged false statements were made in an "administrative proceeding" (R. 7) as necessarily holding to the contrary. But if that is the intended meaning, the statement is erroneous It is true, to be sure, that the matter of admitting attorneys to practice involves considerations which touch closely upon the administration of the business of the courts. It is no less true that such proceedings involve conventional fact-finding and the determination of rights and privileges. In all events, we believe it immaterial that the proceeding may be deemed to have administrative aspects. The question is simply whether the proceeding, however denominated, is one which the court had power to conduct and one in which a law of the United States authorized an oath to be administered.

[3] In the *Summers* case, in which the state courts characterized the admission proceeding as administrative, this Court held (325 U.S. at 568-569):

> A claim of a present right to admission to the bar of a state and a denial of that right is a controversy. When the claim is made in a state court and a denial of the right is made by judicial order, it is a case which may be reviewed under Article III of the Constitution when federal questions and proper steps taken to that end, in this Court.

local rule of court (quoted *supra*, pp. 2-3). Three hearings were subsequently held, with full opportunity for examination and cross-examination of witnesses, and the court then entered an order finding that appellee had not made a satisfactory showing under the rule so as to warrant admission (R. 7). It was appellee's testimony at one of these hearings which gave rise to the indictment for perjury.

B. Apart from the local rule of court, federal law authorizes administration of a binding oath in an admission proceeding.

Congress has not attempted to specify individually the numerous types of proceedings in which a federal judge may administer a binding oath, Instead, it has broadly provided (28 U.S.C. 459) that "[e]ach justice or judge of the United States may administer oaths and affirmations and take acknowledgments." We do not suggest that this provision empowers a judge to administer an oath for any purpose which he may conceive, however unrelated that purpose may be to the conduct of the business of the judiciary. The authorization to administer oaths must certainly be taken to carry with it the implied limitation that the proceeding in which the party is put under oath be one which it is within the power and competence of the court to conduct. But that, we submit, is the only limitation. There can be no justification for implying the limitation that a court may administer binding oaths in conducting a trial but that it may not do so in conducting other proceedings (*e. g.*, admission proceedings or various types of ancillary proceedings) no less within the competence of courts. In particular, there is no warrant for limiting a court's authority to require an oath to strictly "judicial" actions.

If precise specification of each type of proceeding in which an oath may be administered were a prerequisite to application of the penalties for perjury, the result would be a virtual nullification of the perjury statute, for neither statute nor federal rule provides in terms that an oath shall be administered to a witness who testifies at an ordinary district court trial.[4] The failure of Congress to detail the specific types of proceedings in which a judge may administer an oath simply reflects a familiar fact of our history:—that, in Anglo-American law, judges, from time immemorial, have had the inherent power to administer oaths in the conduct of proceedings which fall within their jurisdiction.[5] The provision in 28 U.S.C. 459, gen-

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[4] Note that the Federal Rules of Civil Procedure, although they make no provision for administration of an oath to a witness before the court, specifically confer upon masters power to put witnesses under oath. Rule 53(c). See 70 *Corpus Juris* 482, note 30(h), for state cases discussing a court's inherent power to administer an oath to a witness.

[5] The history of the requirement that a witness must take an oath in order to give testimony goes back to early civilizations and has a long history at common law. Wigmore on *Evidence*, 3d ed., Sec. 1815. "The oath used to be regarded as a summoning of Divine vengeance upon false swearing, whereby when the spectators see the witness standing unharmed they know that the Divine judgment has pronounced him to be a truth-teller. But it is now conceived as a method of reminding the witness strongly of the Divine punishment somewhere in store for false swearing, and thus of putting him in a frame of mind calculated to speak only the truth as he saw it." *Id.*, Sec. 1816. For centuries, Anglo-American law has remained faithful to the precept that " for *all testimonial statements* made in court the oath is a requisite" (*id.*, Sec. 1824), the only qualification being that it is now generally permitted, both in English and American jurisdictions, to substitute a solemn affirmation for an oath. *Id.*, Sec. 1828; Federal Rules of Civil Procedure, Rule 43(d).

erally authorizing judges to administer oaths, is merely declaratory of the common law. Indeed, that section of the Code aside, there would be a "law of the United States" permitting the federal courts to put a witness under oath:—the common law, together with such provisions of constitutional and statutory law as confer the judicial power upon the particular tribunal.

The decisions fully confirm the view that the power to administer oaths is an inherent attribute of the judicial power and that it extends to all proceedings within the tribunal's competence, whether they be characterized as "judicial" or "administrative." *Glickstein* v. *United States*, 222 U.S. 139, involved an indictment for perjury committed before a referee in bankruptcy, an officer authorized by statute to conduct an examination, but not specifically authorized to administer an oath. This Court held that the authority to put a witness under oath and the liability of the witness to punishment for false swearing are inherently a part "of the power to compel the giving of testimony" (p. 141). The Court found it inconceivable that there could be authority in a judicial officer to conduct an examination "where no right exists to require that the testimony shall be given under such circumstances and safeguards as to compel it to be truthful" (p. 142). See, also, *Goodman* v. *United States*, 108 F. 2d 516, 520 (C. A. 9), holding that a district judge had discretionary authority to impose an oath of secrecy upon a grand jury witness and to punish a refusal to take the oath as a contempt, even though no federal statute specifically authorized administration of such an oath; *United States* v. *Ambrose*, 2 Fed. 566 (C. Ct., S. D. Ohio), holding that perjury would lie against a clerk

of court who falsely swore to his accounts, since a judge has power to administer oaths in matters arising in his court or coming before him as a judicial officer.[6] Cf. *United States* v. *Morehead*, 243 U.S. 607; and see also the cases cited *infra*, pp. 14-15.

By the same token, once the oath has been properly administered, a false swearing lays the basis for invoking the federal perjury statute even though the tribunal administering the oath does not desire the criminal penalty to ensue. It is *Congress* which has determined that perjury before a competent tribunal, once the oath has been properly administered, shall be punished. The tribunal cannot make an exception to that general rule which Congress has established.

C. The applicable rule of court, which in terms authorizes examination of attorneys under oath, has the force of a law of the United States.

Congress has delegated broad rule-making authority to the district courts. 28 U.S.C. 2071 provides: "The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court". There can be no question that such rule-making authority comprehends the establishment of rules for admission of attorneys to practice. Thus 28 U.S.C. 1654 provides: "In all courts of the United States the parties may plead and conduct their own cases personally or

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[6] Other questions arising under the indictment were certified to this Court and the validity of the indictment sustained, *United States* v. *Ambrose*, 108 U.S. 336.

by counsel as, *by the rules of such courts, respectively,* are permitted to manage and conduct causes therein" (emphasis added). See, also, Federal Rules of Civil Procedure, Rule 83. The rule of court here in question explicitly provides that, under the conditions specified, the court may require the "attorney to appear and be examined under oath."

The term "federal law" (or "law of the United States") can, of course, embrace any rule or regulation promulgated by lawful authority, and normally does so. *United States* v. *Howard,* 352 U.S. 212; *Lilly* v. *Grand Trunk R. Co.,* 317 U.S. 481, 488; *Atchison, Topeka and Santa Fe Ry.* v. *Scarlett,* 300 U.S. 471, 474; *Roumanian American Winery, Inc.* v. *Morgenthau,* 152 F. 2d 452, 45 (C. A. 2). Certainly, there is no basis for suggesting that the phrase "law of the United States" is used in an extraordinary or specially restrictive sense in the perjury statute. The decisions of this Court make it abundantly clear that, for purposes of prosecution for false swearing or perjury, the authority for administering an oath may be found either in a statute of the United States or in a rule or regulation promulgated pursuant to a valid delegation of rule-making authority.

United States v. *Smull,* 236 U.S. 405, involved a prosecution for perjury arising out of a false affidavit submitted by a homestead applicant in filing papers called for by regulations of the General Land Office. "It cannot be doubted", this Court stated in sustaining the indictment (pp. 408-409), "that a charge of perjury may be based upon Section 125 of the Criminal Code [the federal perjury statute] where the affidavit is required either expressly by an act of Congress or by

an authorized regulation of the General Land Office * * *."[7]

In *Caha* v. *United States*, 152 U.S. 211, it was charged that perjury was committed in a contest before a land officer in respect to the validity of a homestead entry. It was contended that, since there was no statutory authorization for such a contest, the oath was not taken in a "case in which a law of the United States authorizes an oath to be administered". This Court pointed out that there was a general grant of authority to the Land Department to prescribe appropriate regulations for the disposition of the public land and that, pursuant to this authority, the Department had adopted a regulation providing for a hearing before local land officers in cases of disputed homestead entries. On this and other grounds, it concluded (p. 218): "Clearly, then, within the scope of Section 5392 [the federal perjury statute] the local land officers in hearing and deciding upon a contest with respect to a homestead entry constituted a competent tribunal, and the contest so pending before them was a case in which the laws of the United States authorized an oath to be administered." See, also, *United States* v. *Bailey*, 9 Pet. 238.[8]

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[7] As the *Smull* case illustrates, perjury may occur in the course of *ex parte* proceedings or investigations, as well as in ordinary lawsuits. See, also, *Woolley* v. *United States*, 97 F. 2d 258, 261 (C. A. 9), certiorari denied, 305 U.S. 614, involving a charge of perjury arising out of an *ex parte* investigation by the Securities and Exchange Commission, and cases there cited.

[8] Obviously, there can be no basis for suggesting that administrative agencies may adopt rules requiring the administration of an oath but that courts may not promulgate such rules, particularly in light of the fact that courts have always had the inherent power to administer oaths in the conduct of their business (see

In sum, we submit that the rule of court here involved was a valid regulation appropriate to the exercise of the judicial power and within the rule-making authority of district courts; that the rule in terms authorized the taking of testimony under oath; and that it follows perforce that false testimony given in a proceeding conducted under the rule constitutes the offense of perjury.[9]

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supra, pp. 11-13). The cases cited in the text also emphasize that appellee's position is not aided by the suggestion that the proceeding in which he appeared served an "administrative" purpose (see note 2, p. 9, *supra*).

[9] The opinion below states (R. 10) that the "purpose of the rule was accomplished when Hvass was denied the right to participate" in the cases in which he sought to appear as counsel. But the indictment rests upon the perjury statute, and seeks to enforce the purposes of that statute. The rule is relevant, to be sure, in determining whether the proceeding in which the alleged false testimony was given was a proceeding in which the administration of an oath was authorized. But assuming that to be so (as we believe we have shown), it is the perjury statute which establishes and delineates the offense charged. It is that statute which, for reasons of public policy requiring no elaboration, imposes a sanction for false swearing. Ordinarily, a proceeding in which false testimony was given will have terminated before an indictment based on such testimony is returned. But neither the termination of the original proceeding nor the failure of the perjurious testimony to accomplish its object can constitute a defense to the criminal charge. Even unsuccessful perjury is prohibited and is to be prevented.

CONCLUSION

The judgment below should be reversed and the cause remanded for trial.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.

WARREN OLNEY III,
Assistant Attorney General.

BEATRICE ROSENBERG,
ALBERT M. CHRISTOPHER,
Attorneys.

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In the Supreme Court of the United States

OCTOBER TERM, 1956

UNITED STATES OF AMERICA, APPELLANT

v.

CHARLES T. HVASS

On Appeal from the United States District Court for the Northern District of Iowa, Central Division

---

BRIEF IN OPPOSITION TO APPELLEE'S MOTION TO AFFIRM

J. LEE RANKIN,
Solicitor General,

WARREN OLNEY III,
Assistant Attorney General,

BEATRICE ROSENBERG,
ALBERT M. CHRISTOPHER,
Attorneys,
Department of Justice,
Washington 25, D. C.

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 848

UNITED STATES OF AMERICA, APPELLANT

v.

CHARLES T. HVASS

On Appeal from the United States District Court for the Northern District of Iowa, Central Division

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BRIEF IN OPPOSITION TO APPELLEE'S MOTION TO AFFIRM

The court below dismissed an indictment for perjury on the ground that sworn testimony given in a proceeding conducted under a local rule of court to determine an attorney's fitness to practice before it was not testimony in a "case in which a law of the United States authorizes an oath to be administered", within the meaning of the federal perjury statute (18 U.S.C. 1621). Appellee admits that this Court has jurisdiction to hear this appeal under the Criminal Appeals Act (18 U.S.C. 3731) because the dis-

missal of the indictment was predicated upon a construction of the perjury statute (Motion 5), but he moves this Court to affirm the judgment of the district court on the ground that the question is insubstantial.

Appellee contends that this Court is bound by the ruling of the district court that the admission hearing was part of an administrative proceeding, and that, on this basis, the ruling amounts to no more than a holding that a rule of court which requires an oath in an administrative proceeding will not support an indictment for perjury. Even on this interpretation of the holding, the claim of unimportance fails. Certainly, it is important for courts to know whether, as a means to enforcement of their rules of administration adopted pursuant to 28 U.S.C. 2071 (conferring authority to "prescribe rules for the conduct of their business"), they are empowered to administer oaths. If the grant of rule-making authority carries such power with it, then the perjury statute (covering "any case in which a law of the United States authorizes an oath to be administered") perforce applies even if the proceeding be deemed to involve an exercise of administrative, rather than judicial, power.

Moreover, we do not believe that the district judge (in this case, a judge from a different district sitting by designation) could properly treat as merely administrative (or ministerial) rules relating to the admission and removal of attorneys. This Court has said, in relation to the admission of attorneys to practice in federal courts, that such a proceeding "is

not the exercise of a mere ministerial power. It is the exercise of judicial power, and has been so held in numerous cases." *Ex parte Garland*, 4 Wall. 333, 378-379. See, also, *Randall* v. *Brigham*, 7 Wall. 523, 535; *Ex parte Secombe*, 19 How. 9, 15. Even where a state regarded a proceeding for admission as administrative, this Court held in *In re Summers*, 325 U.S. 561, 568-569:

> A claim of a present right to admission to the bar of a state and a denial of that right is a controversy. When the claim is made in a state court and a denial of the right is made *by judicial order*, it is a case which may be reviewed under Article III of the Constitution when federal questions are raised and proper steps taken to that end, in this Court. [Emphasis added.]

See, also, *Schware* v. *Board of Bar Examiners*, No. 92, O.T. 1956, and *Konigsberg* v. *State Bar of California*, No. 5, O.T. 1956, both decided on May 6, 1957. By the same token, a rule which represents an exercise of judicial power by the district court cannot become a rule of administration even if the court should call it such.

In the instant case, the district court *entered an order* fixing a date for appellee to appear and be examined under oath pursuant to the local rule (Juris. St. 11). Three hearings were held in all and the court then *entered an order* finding that the applicant had not made satisfactory showing under the local rule to warrant admission (Juris. St. 11-12). The procedure followed confirms the conclusion that the hearing was a judicial one.

Although this Court is bound by the construction of the indictment as a pleading, when "the District Court holds that the indictment, not merely because of some deficiency in pleading but with respect to the substance of the charge, does not allege a violation of the statute upon which the indictment is founded, that is necessarily a construction of that statute" (*United States* v. *Borden Co.*, 308 U.S. 188, 193). That is the case here. The district judge held that a rule regulating the admission of attorneys and requiring an oath in connection therewith does not have sufficient force of law to bring the perjury statute into play. That ruling, which we believe to be clearly erroneous, cannot bind this Court.

CONCLUSION

For the reasons set forth in the Jurisdictional Statement and in the foregoing brief, probable jurisdiction of this appeal should be noted.

J. LEE RANKIN,
Solicitor General.

WARREN OLNEY III,
Assistant Attorney General.

BEATRICE ROSENBERG,
ALBERT M. CHRISTOPHER,
Attorneys.

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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 92

UNITED STATES OF AMERICA — *Appellant*

vs.

CHARLES T. HVASS — *Appellee*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA, CENTRAL DIVISION

APPELLEE'S BRIEF

WARREN B. KING
945 Northwestern Bank Bldg.
Minneapolis 2, Minnesota
CHARLES ALAN WRIGHT
301 Townes Hall
Austin 12, Texas
Attorneys for Appellee

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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 92

UNITED STATES OF AMERICA

Appellant

vs.

CHARLES T. HVASS

Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA, CENTRAL DIVISION

APPELLEE'S BRIEF

OPINION BELOW

The memorandum decision of the District Court (R. 5-10) is reported at 147 F. Supp. 594.

QUESTION PRESENTED

Does an allegedly false statement of a material fact, made in a proceeding held pursuant to a local rule of the district court, constitute perjury within the meaning of *18 U. S. C.*, §1621, when the court which made the rule has construed it as not intended to be "a law of the United States authoriz(ing) an oath to be administered" within the meaning of the statute?

SUMMARY OF ARGUMENT

1. Since the holding of the court below was that Local Rule 3 of the district court is not "a law of the United States authoriz(ing) an oath to be administered", the holding necessarily delimited that phrase as used in the perjury statute, *18 U. S. C.*, § 1621. This court has previously held in such a situation that an act of Congress has been construed, and thus that the court has jurisdiction under the Criminal Appeals Act. *18 U. S. C.*, § 3731. But the situation in this case, where the trial court has recognized the scope of the statute but has held that its own rule does not come within it, goes beyond anything in the precedents and does not represent the evil Congress sought to reach in the Criminal Appeals Act. The court may wish to consider whether review in the usual fashion by the Court of Appeals is not to be preferred to extension of the unique jurisdiction of the Criminal Appeals Act to such a situation.

2. Administration of the oath to appellee cannot be justified, if at all, except by Local Rule 3. When appellee testified, the court stated that his testimony was taken pursuant to Local Rule 3. The indictment alleges that the testimony was pursuant to Local Rule 3. Even if some other authority for taking such testimony from appellee exists, the government cannot rely on it at this stage, when no such authority was claimed at the time the testimony was given or in the indictment.

In any event, no other authority does exist. The statute authorizing judges to administer oaths, *28 U. S. C.*, § 459, makes a judge a competent officer. It does not have any bearing on the other element of a perjury prosecution, that the case be one in which a law of the United States authorizes an oath to be administered. Such inherent powers as a court may have to require testimony under oath are limited to judicial proceedings before the court. The trial

court has construed the indictment as charging false testimony in an administrative, rather than a judicial, proceeding. The trial court's construction of the indictment is binding on this court on an appeal pursuant to the Criminal Appeals Act—*United States v. Borden Co.* (1939), 308 U. S. 188, 193— and the authorities support the trial court's view that an application for temporary permission to participate in a case is an administrative proceeding. *Brooks v. Laws* (D. C. Cir. 1953), 208 F. 2d 18.

3. In determing whether an administrative regulation is a "law of the United States" wit' in the meaning of a statute, no fixed rule applies. Such a regulation may or may not be a "law of the United States", depending on the structure of the statute and on the intention of the body which authorized the regulation. *United States v. Howard* (1957), 352 U. S. 212, 216-7. In this case the trial court has construed Local Rule 3 as not intended to invoke the perjury penalty. The construction by the trial court of a rule it made itself is binding. *Duncan's Heirs v. United States* (1833), 7 Pet. 435, 451-2.

The construction by the trial court of its own Local Rule 3 is reasonable. It avoided otherwise serious questions as to the validity of the rule. And it yields the practical result that the rule may still be relied on by the court in determining which non-resident attorneys will be granted permission to participate in cases before it, while at the same time it is left to the authorities of the bar to which the non-resident attorney belongs to determine whether his testimony was truthful, rather than having these matters decided by a perjury trial in a federal court in a district other than that in which the attorney resides.

ARGUMENT

I.

Jurisdiction of this court.

As required by Rule 16(4) of the Revised Rules of this court, we first address ourselves to the question of jurisdiction. Jurisdiction in this case must rest, if at all, on the Criminal Appeals Act of 1907, *18 U. S. C.*, § 3731. The purpose of that statute is stated in *Frankfurter and Landis, The Business of the Supreme Court* (1928), 120:

> "The reasons which impelled the enactment of the Act of 1907 remain. They will continue to be controlling. Congress is not apt to give the power of invalidating its legislation wholly to the inferior federal courts without an appeal as of right to the Supreme Court, and Congress is still less likely to do this with regard to criminal legislation. The criminal law is increasingly resorted to, for the 'achievement of some social betterment rather than the punishment of the crimes as in cases of *mala in se*' The defeat of these purposes is not likely to be entrusted to any tribunal other than the Supreme Court."

The order of the district court in the present case did not, on any view, invalidate Congressional legislation nor thwart the achievement of some social betterment which the legislative branch has sought. Instead the trial court held only that its own local rule is restricted in purpose and effect, and that the rule which the trial court has power to make, interpret, amend, repeal, enforce or not enforce was not intended to substitute perjury trials for the customary methods of disciplinary action against lawyers.

We concede, as we did before (Motion to Affirm, p. 5), that this court has held that a decision that a particular administrative regulation is or is not a "law of the United States" within the meaning of the perjury statute is, techni-

cally, a construction of the statute, and gives jurisdiction to this court under the Criminal Appeals Act. *United States v. George* (1913), 228 U. S. 14. But neither the *George* case nor any other we have found involves the unusual situation presented by the present case, where the trial court is construing a rule it has made itself. Thus the court may wish to consider whether it should extend to such a situation as this "the unique jurisdiction of the Criminal Appeals Act of 1907, as amended, whereby decisions of district courts raise almost abstract questions of law regarding the invalidity or construction of criminal statutes, in that they do not come here in the setting of normal adjudications on the merits of a controversy." *United States v. Congress of Industrial Organizations* (1948), 335 U. S. 106, 127 (concurring opinion).

II.

Administration of the oath to appellee cannot be justified except by Local Rule 3 of the district court.

The bulk of the government's argument (Brief, pp. 8-13) is an attempt to justify administration of the oath to appellee, and thus the validity of the indictment, without reference to Local Rule 3 of the district court. The government argues that the proceeding in which appellee took the oath was a judicial proceeding, and claims that administration of the oath in such a proceeding is authorized either by *28 U. S. C.*, § 459, which empowers judges to administer oaths, or by the common law.

There are two decisive objections to this line of argument. (1) Even if some authority other than Local Rule 3 exists, the government cannot rely on it now, since at every stage in the proceedings below Local Rule 3 was the only authority specified for administration of the oath. (2) In any event, there is no authority other than Rule 3

which is relevant here. The oath was administered in an administrative proceeding, while any "inherent powers" the court may have had are applicable only in judicial proceedings.

1. The present indictment charges appellee with having committed perjury in a hearing held "under and pursuant to the provisions of Rules 3 and 8, Local Rules of the United States District Court, Northern District of Iowa" (R. p. 1). This allegation of the indictment fairly summarizes the events which led up to it, for from beginning to end the court treated the hearing at which appellee testified as one authorized by Local Rule 3 (R. 7). At no time did the judge who conducted the hearing suggest that he was exercising any authority other than that granted by Local Rule 3. Thus even if the court had some power other than that granted by Local Rule 3 to examine appellee and to administer an oath to him, it did not attempt to exercise any such power in this case.

Only last term this court twice held that due process requires that a witness be informed so that he may determine whether a question is authorized before being compelled to answer it. *Watkins v. United States* (1957), 354 U. S. 178; *Sweezy v. New Hampshire* (1957), 354 U. S. 234. And an indictment for contempt of a committee of Congress has been dismissed because it failed to show that the inquiry was within the scope of the authority granted to the committee. *United States v. Lamont* (2d Cir. 1956), 236 F. 2d 312. If an indictment is fatally defective for failure to show the authority pursuant to which questions were asked, it must be equally defective when it alleges an insufficient authority. Appellee, who was told that he was being interrogated pursuant to Local Rule 3, cannot now be tried for perjury on the theory that some vague common law powers supported his interrogation.

2. In any event, there is no authority for administration of an oath such as that taken by appellee except such power as may stem from Local Rule 3.

The government's reliance on *28 U. S. C.*, § 459 may be quickly disposed of. The short of the matter is that no judge administered an oath to appellee. Instead, as the indictment alleges, the oath was administered by the clerk of the district court (R. 1). It is true that a statute not cited by the government, *28 U. S. C.*, § 953, authorizes clerks of court to administer oaths. But this mistake as to the relevant statute highlights the fact that the purpose of both §§ 459 and 953 of the Judicial Code is to make certain classes of officers competent to administer oaths. Neither statute purports to, nor does, delineate the cases in which such a competent officer is to administer the oath.

The perjury statute, *18 U. S. C.*, § 1621, requires *both* that the oath be administered by a competent tribunal, officer or person, *and* that the case be one in which a law of the United States authorizes an oath to be administered. Appellee has never challenged the competency of the clerk to administer the oath. His challenge runs to the second element, and as to this § 953 of the Judicial Code is irrelevant.

Nor is the government's case strengthened by its appeal to "inherent" or "common-law" powers of the court. This court held long ago that a federal judge does not have a roving commission to examine anyone on any subject, his jurisdiction is limited to that granted by statutes and rules. *Ex parte Fisk* (1885), 113 U. S. 713. Whatever inherent powers a court has are confined to judicial proceedings. They are not applicable when the court acts extra-judicially, in a proceeding of an administrative nature.

Appellee does not contend that a clerk of court may not administer an oath in an administrative proceeding con-

ducted by a judge. But false swearing under such an oath constitutes perjury only where such oath was required by a "law of the United States". The common law power to require testimony under oath in a judicial proceeding is not a "law of the United States" authorizing an oath in an administrative proceeding.

The cases cited by the government (Brief, p. 12) hold nothing to the contrary. *Glickstein v. United States* (1911), 222 U. S. 139, 143, involved testimony expressly required by statute in a hearing before a referee in bankruptcy. *Goodman v. United States* (9th Cir. 1939), 108 F. 2d 516, is concerned with contempt, rather than perjury, an oath of secrecy rather than an oath to testify truthfully, and with the obviously judicial proceeding of a grand jury hearing. The only question in *United States v. Ambrose* (C. C., S. D. Ohio 1880), 2 Fed. 556, which even approaches the present case is whether a judge is a competent officer to administer the oath in question; and this court expressly refrained from considering that question when the case was certified to it. *United States v. Ambrose* (1883), 108 U. S. 336, 341.

A state prosecution under a statute similar, for present purposes, to *18 U. S. C.*, § 1621, furnishes a compelling analogy. Defendant pleaded guilty to a charge of illegally transporting intoxicating liquor. Before he was sentenced he was sworn, and examined by the presiding judge as to whether he had been arrested before. The state, believing his testimony on this subject to be untrue, indicted him for perjury, but it was held that his conviction on this charge could not stand. *State v. Larson* (1927), 171 Minn. 246, 213 N. W. 900. The court reasoned that the examination of the defendant after conviction had not been authorized by statute, and thus the testimony in question was extra-judicial. Nor could the perjury prosecution be sus-

tained on the basis of the court's power to administer an oath during trial, since that power had terminated with the plea of guilty. See similarly *State v. McCarthy* (1889), 41 Minn. 59, 42 N. W. 599.

In the present case the district court expressly found

> "Administration of the oath to Hvass was not a part of any judicial proceeding in the Wyrum and Lash cases, but rather was a part of an administrative proceeding by which the court sought to determine whether Hvass should be permitted to participate as an attorney in these cases." (R. 7)

This construction of the indictment by the district court, that it charges a false statement in an administrative rather than a judicial proceeding, is conclusive on this court.

> "This court must accept the construction given to the indictment by the district court as that is a matter we are not authorized to review."

United States v. Borden Co. (1939), 308 U. S. 188, 193; *United States v. Carbone* (1946), 327 U. S. 633.

Even if the trial court's construction of the indictment were not conclusive here, it is, in any event, well supported by the authorities. Thus see *Rosenthal v. State Bar Examining Committee* (1933), 116 Conn. 409, 415-6, 165 Atl. 211, 213-4:

> "Proceedings for the admission of attorneys are not actions or suits at law; they are in the nature of investigations by the courts or their representatives to determine whether particular candidates are qualified to become its officers. * * * Such an investigation, like that authorized by the statutes to determine the fitness of physicians and surgeons and other persons, to carry on professions or callings in which the public has such an interest as to bring them within the regulatory scope of the police power, is really administrative in its nature. * * * Courts or their

judges must of necessity perform many acts of an administrative nature, acts which so far pertain to the judicial department of the government that they could not properly be performed by the representatives of its other branches, as, for example, the appointment and removal of clerks of courts and other such officers; but in the method of the performance of such administrative functions, courts are under no more stringent limitations than are the executive or legislative departments in similar situations."

See also the statement by Cardozo, J., in *People ex rel. Karlin v. Culkin* (1928), 248 N. Y. 465, 479, 162 N. E. 487, 492. Far the fullest discussion of the question is in *Brooks v. Laws* (D. C. Cir. 1953), 208 F. 2d 18. The holding there, after an elaborate historical and analytical discussion, is that admission to the bar is "a ministerial act which is performed by virtue of the judicial power * * * rather than a judicial proceeding." This holding has since been followed in *In re Jacobi* (D. C. Cir. 1954), 217 F. 2d 668, and *Application of Wasserman* (9th Cir. 1956), 240 F. 2d 213, 214.

In summary, the express reliance on Local Rule 3 in the proceedings leading up to appellee's testimony and in the indictment preclude the government from now relying on any authority for the oath other than Local Rule 3, even if such other authority existed. And in view of the administrative nature of the proceedings, as declared both by persuasive decisions and by the binding construction of the indictment in the court below, there was, in fact, no authority to administer the oath save such as may be derived from its own Local Rule 3.

III.

Local Rule 3, as construed by the court which promulgated it, is not "a law of the United States authoriz(ing) an oath to be administered."

In the preceding section of this brief we have demonstrated that there is no "law of the United States authoriz(ing) an oath to be administered" to appellee in a proceeding such as that at which he testified unless Local Rule 3 of the district court be considered such a law.

In an earlier day the notion that an administrative regulation made by a single district court could be a "law of the United States" would not have been taken seriously.

> "* * * (N)o rule or regulation can become or have the force of law. Congress cannot, if it would, confer law-making power on the commissioner or secretary."

United States v. Bedgood (S. D. Ala. 1891), 49 Fed. 54, 58. And see *United States v. Manion* (D. Wash. 1890), 44 Fed. 800, 801. Today such decisions are of interest only to the antiquarian, for they speak from a time when the administrative process was in its infancy, and when rigid and comparatively naive notions of separation of powers were still in vogue.

Today it is well recognized that a regulation may have the force of law if the regulation has a clear legislative basis, *e. g., Viereck v. United States* (1943), 318 U. S. 236, 241, and is neither unreasonable, inappropriate or plainly inconsistent with the statute. *United States v. Obermaier* (2d Cir. 1950) 186 F. 2d 243, 247, cert. denied 340 U. S. 951 (1951). This modern understanding of what is meant by "law of the United States" has never been challenged by appellee, and was expressly accepted by the trial court in the present case.

> "* * * (W)e recognize that generally speaking a rule of court has the force of law."

(R. 10) Thus the trial court acknowledged the rule, as stated by this court in *Singer v. United States* (1945), 323 U. S. 338, 345, that there is no

> "fixed principle that a regulation can never be a 'law' for purposes of criminal prosecutions. It may or may not be, depending on the structure of the particular statute."

But in determining whether a *particular* regulation is a "law of the United States" within the meaning of a *particular* statute, there are not one, but two, variables which must be considered. Analysis of the regulation in question, its purpose and meaning, is needed to determine whether it comes within the concept of "law" as used in the statute. This is well illustrated by the recent decision in *United States v. Howard* (1957), 352 U. S. 212. The Federal Black Bass Act makes it unlawful for any person to deliver black bass or other fish for transportation from any state if such transportation is contrary to the "law of the State." *16 U. S. C.*, § 852. Defendant in that case had transported black bass contrary to a regulation of the Florida Game & Fresh Water Fish Commission. This made it necessary for this court to determine whether the regulation of the state commission was a "law of the State" within the meaning of the federal statute. The court first developed the modern understanding of "law", as we have set it out above. But then the court had to consider the other variable, the intention of Florida with regard to its regulation. The court said, at 216-7:

> "Here, it is beyond question that the Florida Legislature, in Fla. Stat. § 372.83, intended to and did make infraction of any commission regulation a violation of state law, punishable as a misdemeanor."

Thus the court held that violation of the regulation was a crime under the federal statute.

In our case the trial court has construed Local Rule 3 as not having been intended to serve as a predicate for a perjury prosecution. The court first defines the purpose of the rule, and says that this perjury indictment comes "after Rule 3 had served its purpose" (R. 9). Again the court says:

> "The purpose of the rule was accomplished when Hvass was denied the right to participate in the Wyrum and Lash cases and if disciplinary action against the defendant Hvass is deemed advisable such action should be instituted in the regular manner." (R. 10).

If, as is freely conceded, the district court for the Northern District of Iowa has the power to make a rule with the force of "a law of the United States", it must also have the power to refrain from making "a law of the United States". This is what it has done in this instance, by authoritatively construing its own rule as not being "a law of the United States" within the meaning of *18 U. S. C.*, § 1621.

The construction which a district court puts on a rule which it has made itself is, save in rare instances, binding. The court which made the rule is in the best position to determine what the rule means and what it was intended to accomplish. And since that court has the power to amend or repeal its rule, a decision by some other court as to the meaning of the rule contrary to that of the court which made the rule would be a useless act.

Long ago this court said:

> "On a question of practice, under the circumstances of this case, it would seem that the decision of the district court, as above made, should be conclusive. How can the practice of the court be better known

> or established than by its own solemn adjudication on the subject?"

Duncan's Heirs v. United States (1833), 7 Pet. 435, 451-2. This principle, that the body which makes a rule can authoritatively define that rule, is true of regulations generally. Indeed the case just quoted from was cited by the court in support of its statement with regard to administrative rules in *Norwegian Nitrogen Products Co. v. United States* (1933), 288 U. S. 294, 325:

> "The Commission was without competence by any decision it might make to fix the meaning of the phrase as used by Congress or the courts. It had power, however, to interpret its own rules and any phrase contained in them."

And in *Federal Communications Comm. v. Pottsville Broadcasting Co.* (1940), 309 U. S. 134, 143, n.6, the court said bluntly that an interpretation by the F. C. C. of one of its Rules of Practice "is binding upon the courts".

As the Third Circuit puts it:

> "It has always been held that a court is the best judge of its own rules, and an Appellate Court will not reverse such construction, except where manifestly erroneous * * *."

Rose v. Columbian Reinforced Concrete Co., (3rd Cir. 1912) 193 Fed. 403, 404. The same doctrine is a commonplace also in the state courts. E. g., *Stanton v. Kinsey* (1894), 151 Ill. 301, 306, 37 N. E. 871, 872; *Evans v. Backer* (1886) 101 N. Y. 289, 292, 4 N. E. 516; *Dellaceasse v. Floyd* (1938), 332 Pa. 218, 224, 2 A. 2d 860, 863; *Wagner v. Edginton Coal Co.* (1925), 100 W. Va. 117, 120, 130 S. E. 94, 96.

It is of no significance that in this instance the district court for the Northern District of Iowa announced the meaning of its rule through a judge of another district, sitting by designation. A judge sitting by designation may hold a district court rule invalid. *Johnson v. Manhattan Co.* (1933), 289 U. S. 479, 503. *A fortiori* he must be able to construe such a rule. And in any event the action is that of the court, not of an individual judge. It makes no difference whether the rule of a court is construed by the judge who wrote it, by his successor in that district, or by a judge from another district sitting by designation. So long as the particular judge acts for the court, the authorities noted above are in point, and the construction put on the rule by the court is final and authoritative.

The trial court had sound reasons for construing Local Rule 3 as not "a law of the United States" for purposes of the perjury statute. As the court noted, Local Rule 3 is "unique and unusual" (R. 10). Indeed, so far as counsel could find, there is no other court in the country, state or federal, which asks an out-of-state attorney to prove under oath that he has never violated the canons of ethics as a condition to permitting him to participate, along with local counsel, in a specific case. In another case involving Local Rule 3, the Eighth Circuit said:

> "Rule 3 is vigorously assailed as being arbitrary, discriminatory, unreasonable, destructive of the rule of comity and ex post facto. We, however, deem it unnecessary to pass upon the validity of this rule * * *"

DeParcq v. United States District Court (8th Cir. 1956), 235 F. 2d 692, 699. A similar attack on the validity of Local Rule 3 was pressed with vigor by appellee in the present case. By construing the rule as not supporting an indictment for perjury, the trial court was, as it expressly

noted (R. 10) able to avoid passing on the question of validity.[1]

Surely it is not necessary to cite to this court authority for the proposition that courts from time out of mind have construed statutes and rules in a restrictive manner in order to avoid otherwise serious questions as to their validity.

There was particular reason for the trial court to give a restrictive construction to that sentence of Local Rule 3 which purports to authorize administration of an oath, since it is this sentence which is the target of the sharpest attack on the validity of the rule. The other sentences of the proviso to Local Rule 3 push the doctrine of classification to an extreme, since they require a showing of non-violation of the canons of ethics only from non-resident attorneys in personal injury and damage suits where the injured person was a resident of Iowa and was injured there, and even within this gerrymandered class leave it to the judge, in his unfettered discretion, to decide which attorneys are to be required to make such a showing. But the final sentence restricts the classification still further.

> "The court as a part of said showing may require the plaintiff and the said attorney to appear and be examined under oath."

Surely this wears the cloth too thin. It exposes the arbitrary and discriminatory nature of the rule by indicating that it applies only to plaintiff's lawyer, and not to non-resident attorneys who appear for a defendant, and by

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[1] Although the decisions are not entirely consistent, it is appellee's understanding that this court will not consider, in an appeal under the Criminal Appeals Act, the question of validity on which the trial court did not pass. United States v. Borden Co. (1939), 308 U. S. 188, 206-7; United States v. Petrillo (1947), 332 U. S. 1, 15 (concurring opinion). For this reason the validity of the rule is not challenged here.

leaving it to the further discretion of the judge whether to require examination under oath of the unlucky plaintiff's attorney called upon to make a showing, or whether to be content with the attorney's assurances not given under oath.

Either through design or oversight, the government states in its brief "Moreover, there is no challenge to the fairness of the procedures which were followed" (Brief, p. 6); "Moreover, there is no challenge to the procedures which were followed" (Brief, p. 9). So that there will be no misunderstanding, the procedures followed by the local district court, pursuant to Local Rule 3, were challenged by appellee in his motion to dismiss the indictment. Among other challenges to the procedures established by and followed pursuant to Local Rule 3 were the following:

1. Local Rule 3 denies the right to a speedy and inexpensive trial.

We do not approve of a procedure that denied to Wyrum and Lash their right to a speedy and inexpensive trial as provided by Rule 1 of the *Federal Rules of Civil Procedure*. The practical effect of Local Rule 3 was to impose upon Wyrum and Lash the tremendous expense of paying the costs for subpoenaing witnesses to the hearings conducted pursuant to the local rule. They had their own expenses of travel, board and lodging to pay. Omitting any consideration of the value of the attorney's time, he was required to bear the cost of his own travel, board, lodging and other incidental expense. These costs rested upon the attorney and the clients. Three days were consumed in the taking of testimony at the hearings and the trials of the main actions were delayed by at least four weeks. The practical effect of this expense confronting the local resident and the non-resident attorney under Local Rule 3

in all instances *compels* the employment of a resident attorney *only*.

2. Local Rule 3 by its very application prevents its being attacked by the non-resident attorney in the appellate courts.

If temporary permission is granted no question is raised. But if denied the non-resident attorney's name is stricken from the record and a resident attorney substituted instead. If the case is settled the question is moot. If the case is tried and won then no question is involved. Whatever is done with the case thereafter, the non-resident attorney, not being a party to the action, has no standing in court to appeal from a final judgment and question the validity of Local Rule 3.

3. Local Rule 3, as it has been administered, allows the very party which is opposed to the claim in the main action to become a fact gathering body on the question of the non-resident attorney's ethics.

Investigators from the American Association of Railroads become the investigative arm under the procedure followed. The railroads' opposition to non-resident counsel becomes an accomplished purpose through its power of investigation. An investigation not aimed at a disclosure of the attorney's ethical conduct, but rather directed to the disclosure of evidence which questions the non-resident attorney's conformance with all the standards to be applied.

4. Local Rule 3 by its very wording casts an awesome shadow of doubt upon the innocence from wrong doing of the non-resident attorney and casts all burdens of proof upon him.

The local rule is contrary to our fundamental concept of justice that "one is clothed with innocence and not with guilt." It requires a task that borders on the impossible for any attorney to prove by a fair preponderance or by clear and convincing evidence or beyond a reasonable doubt or whatever unknown test the court may apply under the procedure established in Local Rule 3 that during his lawyer life he has not violated a standard of conduct in particular instances of which he is not apprised or accused until after he appears at the hearing. For no complaint, nor list of charges, nor bill of particulars, nor petition of grievances, nor any other form of notice whatsoever was furnished to the non-resident attorney prior to the actual reception of evidence during the hearing. It would seem that this type of procedure does violence to our concept of due process and to our concept of notice of charges so essential to a fair hearing.

5. Local Rule 3 imposes penalties ex post facto.

Local Rule 3 came into being at a time long after the Wyrum and Lash cases had been sued, docketed and were at issue. Not until August 31, 1955, did the court announce a local rule to be effective October 1, 1955, under which it might require non-resident attorneys to show under oath that they had not been guilty of violating any of the canons of ethics of the American Bar Association as a condition on their participation in the case. Thus the rule applies a penalty to conduct which was not present at the time the conduct took place, since appellee was not asked about any incident later than April, 1955, and all of the

incidents as to which he was examined occurred principally in previous years.

6. Local Rule 3 changes the burden of proof.

Local Rule 3, under the procedures followed, in effect does not require that any charge be proved against the non-resident attorney. On the contrary, it allows any charge to be made against the attorney at the hearing with which the attorney is not acquainted prior to the hearing. The burden is then imposed upon the attorney to disprove the charge, again by whatever test of burden of proof the local court desires. If the charge is met with denial, the scales of the burden then balance and, hence, the attorney has failed to disprove rather than the complaining party required to prove..

7. The procedure set forth in Local Rule 3 invites officious intermeddling.

A requisite showing pursuant to the local rule may be required on motion of a member of the bar of either district, thus any lawyer who belongs to the bar of the Iowa Federal Court is given the right to conduct an inquiry into the professional conduct of a non-resident attorney who seeks to participate in a particular case. The practical effect of such a procedure needs no illustration.

8. The procedures followed by the local court pursuant to Local Rule 3 required appellee's appearance at the hearings.

Although on its face Local Rule 3 appears to give some choice to the non-resident attorney whether or not to seek permission to participate in a particular case, the procedures followed under the local rule prove conclusively that the attorney has no choice in the matter. If his name

appeared on the pleadings of a case pending *prior* to the adoption of Local Rule 3, the non-resident attorney was required either to appear at the time and place set for the hearing under Local Rule 3, or in the alternative run the gauntlet of the contempt power of the local court. See *DeParcq v. United States District Court* (8th Cir. 1956), 235 F. 2d 692, 699.

We feel that the statements set forth in the government's brief are unwarranted and unfair, especially in view of the limited transcript of record that failed to include the numerous exhibits introduced and received by the lower court at the time of argument on the motion to dismiss. At this late date, because we did not anticipate such assertions by the government, the exhibits setting forth the procedures followed pursuant to Local Rule 3 are not before the Court. However, we could not allow the statements to go unchallenged.

There is nothing irrational or arbitrary about the construction the trial court placed on its rule in order to avoid the problems of validity which it would otherwise present. The court has held, in effect, that though the rule may call for an oath in *some* instances, it was not intended that the testimony thus taken should be subject to the penalties of perjury. This is not novel. Wigmore gives a number of examples of testimony which is taken under oath and admissible in a judicial proceeding, though it is not subject to the perjury penalty. *6 Wigmore, Evidence,* § 1832 (3rd Ed. 1940). A fairly common instance is an oral deposition in a civil case. Such depositions are taken under oath, *F. R. Civ. P. 30(c),* though only false testimony as to material matters is punishable as perjury, *18 U. S. C.,* § 1621, and examination on a deposition is not limited by the concept of materiality. *2 Barron & Holtzoff,* Federal Practice and Procedure 311-2 (1950).

On the construction made by the court here, Local Rule 3 remains, until further challenged, a rule of the local district court, which it can continue to apply in determining whether to grant a particular non-resident attorney permission to appear in a case. But it is not a "law of the United States" and perjury will not lie for a false statement under an oath administered pursuant to that rule.

> "Regulations prescribed by the President and by the heads of departments, under authority granted by Congress, may be regulations prescribed by law, so as lawfully to support acts done under them and in accordance with them, and may thus have, in a proper sense, the force of law: but it does not follow that a thing required by them is a thing so required by law as to make the neglect to do the thing a criminal offense in a citizen, where a statute does not distinctly make the neglect in question a criminal offense."

United States v. Eaton (1892), 144 U. S. 677, 688. We recognize that the *Eaton* case, so far as it holds that the particular regulation involved would not support a criminal prosecution, turns on its peculiar facts. See *United States v. Howard* (1957), 352 U. S. 212, 215-6. We cite it here only because, so long as it is thought sound even on its own facts, it demonstrates that a regulation may be valid for internal purposes of the department which made it, though not given effect for purposes of a criminal prosecution. See similarly *Patterson v. United States* (9th Cir. 1910), 181 Fed. 970, 973; *United States v. Robertson* (S. D. Calif. 1919), 257 Fed. 195.

The rule, as construed by the court below, is practical and workable. The Iowa District Court is free to deny permission to appear in proceedings before it to any non-resident attorney who declines to be examined under oath, or whose testimony under oath fails to make a showing of

professional purity satisfactory to the court, or whose testimony under oath is believed by the court to be false. But it is then left to the appropriate authorities of the bar to which the attorney belongs to determine, by their usual procedures, whether the attorney has in fact violated the canons of ethics, and what action, if any, should be taken against him. There is an analogy here to the remark of Judge Fahy, dissenting in *Cammer v. United States* (D. C. Cir. 1955), 223 F. 2d 322, 330, reversed 350 U. S. 399 (1956):

> "In other words, I do not think Congress intended by § 401(2) to grant courts the power by summary proceedings to police such professional conduct of a member of the bar. The well known avenues for suspending, disbarring, or otherwise disciplining attorneys are available to reach their unprofessional and unethical conduct."

The court below has held, in effect, that its rule was not intended to, and does not, substitute a perjury prosecution in Iowa Federal Court for the well known avenues by which a Minnesota attorney would otherwise be tried and, if guilty, punished, for unprofessional and unethical conduct.

This interpretation of Local Rule 3 was in accord with the traditional attitude of federal courts, as expressed by the Fifth Circuit:

> "Concededly, the Federal Court has no right to regulate the practice or malpractice of law in the State Courts * * *."

Hancock v. Andrews (5th Cir. 1947), 161 F. 2d 547, 548. In a case some years ago testimony before the federal court in Minnesota showed that one of two attorneys must have been guilty of improper solicitation—and of false swearing to boot. But the federal court left it for the state bar authorities to deal with the situation:

> "The bar of Minnesota has always maintained a high moral and professional standard, and has always jealously guarded its good name. The attorneys mentioned herein are all members of the bar of the Supreme Court of the State of Minnesota, and were admitted to practice in this court on the strength and faith of the certificates issued to them by the Supreme Court of Minnesota, and it is thought by the three judges of this court that a copy of the record in this case, together with a copy of this memorandum, ought to be transmitted to the State Board of Law Examiners of the state of Minnesota for such action as to that body may seem appropriate."

Chunes v. Duluth, W. & P. Ry. Co. (D. Minn. 1924), 29 Fed. 964, 976-7. See also *Chicago, M. & St. P. Ry. Co. v. Schendel* (8th Cir. 1923), 292 Fed. 326, 330.

The present indictment charges false testimony with regard to questions bearing on champerty and maintenance (R. pp. -4). On the trial court's construction of Local Rule 3, these questions will be left to the Minnesota State Board of Law Examiners, and the Minnesota Supreme Court, for resolution. If Local Rule 3 had been construed as giving rise to a perjury prosecution, the following consequences would ensue: (1) the charges would be passed on by an Iowa jury, rather than by members of the Minnesota bar; (2) proof of the charges would be subject to the "two witness rule" and to the "reasonable doubt" test, rather than to the test of "clear and convincing" evidence which applies in disciplinary proceedings; and (3) the Iowa court would have to decide whether appellee was guilty of solicitation and the rest as those terms are understood in Minnesota—compare *United States v. Slutzky* (3rd Cir., 1935), 79 F. 2d 504—rather than leaving this decision to Minnesota authorities conversant with Minnesota understanding of the terms. Neither the public interest, nor that of appellee, would be served by so extraordinary a procedure.

In view of these practical consequences, the district court for the Northern District of Iowa made a rational and wise decision in determining that its rule, useful as it may be for internal purposes, is not "a law of the United States" and that it was not intended that perjury prosecutions should run against lawyers testifying pursuant to the rule. We repeat again what the trial court said in dismissing the indictment:

> "The purpose of the rule was accomplished when Hvass was denied the right to participate in the Wyrum and Lash cases and if disciplinary action against the defendant Hvass is deemed advisable such action should be instituted in the regular manner." (R. 10)

This construction of the rule, by the court which made it and is best qualified to interpret it, has been shown here not to be irrational, but, on the contrary, to be wise and sound. This court should not disturb it.

CONCLUSION

The order below, dismissing the indictment, should be affirmed.

Respectfully submitted,

WARREN B. KING
945 Northwestern Bank Bldg.
Minneapolis 2, Minnesota
CHARLES ALAN WRIGHT
301 Townes Hall
Austin 12, Texas
Attorneys for Appellee

In the Supreme Court of the United States

OCTOBER TERM 1956

UNITED STATES OF AMERICA

Appellant

VS.

CHARLES T. HVASS

Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA, CENTRAL DIVISION

MOTION TO AFFIRM

Appellee, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that the judgment of the District Court be affirmed on the ground that the question is so unsubstantial as not to warrant further argument.

THE QUESTION IS NOT SUBSTANTIAL

I. The government first argues that the common law power of courts to exact an oath from witnesses in a judicial proceeding is "a law of the United States authoriz[ing] an oath to be administered" within the meaning of 18 U. S. C. §1621. Indeed, in its Conclusion this is the only question the government claims to be substantial. (Juris. St. 8.) The soundness of this claim of common-law or inherent power is irrelevant to disposition of the present case.

The District Court expressly found:

> Administration of the oath to Hvass was not a part of any judicial proceeding in the Wyrum and Nash cases, but rather was a part of an administrative proceeding by which the court sought to determine whether Hvass should be permitted to participate as an attorney in these cases.

147 F. Supp. at 595, Juris. St. 11. This conclusion, that the proceeding was administrative rather than judicial, is amply supported by the authorities. *Brooks v. Laws*, 208 F. 2d 18 (D. C. Cir. 1953); *Application of Wasserman*, 240 F. 2d 213, 214 (9th Cir. 1956); *People ex rel. Karlin v. Curlin*, 248 N. Y. 465, 479, 162 N. E. 487, 492 (1928); *Rosenthal v. State Bar Examining Committee*, 116 Conn. 409, 415-6, 165 Atl. 211, 213 (1933). And in any event, this construction of the indictment by the District Court, that it charges a false statement in an administrative rather than a judicial proceeding, is conclusive on this Court. *United States v. Borden Co.*, 308 U. S. 188, 193 (1939); *United States v. Carbone*, 327 U. S. 633 (1946).

Thus the government's arguments that "the authority is implicit in the judicial power" and that "the question in the instant case is whether the inquiry made was within the scope of the judicial power or competence" (Juris. St. 7) miss the mark. The District Court has held, correctly, that it was not purporting to exercise its judicial power when it examined defendant. It was acting administratively, and a false statement under oath in such an administrative proceeding is not a violation of 18 U. S. C. §1621 unless some "law of the United States" authorizes administration of the oath in such a proceeding.

A compelling analogy can be found in a state prosecution under a statute similar, for present purposes, to 18 U. S. C. §1621. Defendant on a drunken driving charge

had pleaded guilty. The judge, prior to sentencing him, administered an oath and examined him as to prior arrests. It was claimed that he testified untruthfully on this subject. But it was held that he could not be prosecuted for perjury for these supposed untruths. *State v. Larson*, 171 Minn. 246, 213 N. W. 900 (1927). The Minnesota Supreme Court reasoned that no statute authorized post-conviction examination of a defendant, and that the testimony in question was, therefore, extra-judicial. Nor could the perjury indictment be sustained by the court's power to administer an oath during trial, since that power had terminated with the plea of guilty.

For a clear holding that a federal judge does not have a roving commission to examine anyone on any subject, and that his jurisdiction is limited to that granted by statutes and rules, see *Ex parte Fisk*, 113 U. S. 713 (1885).

Inherent power to administer oaths in judicial proceedings does not demonstrate inherent power to administer oaths in administrative proceedings. The government is able to find a substantial question in the present case only by overlooking the District Court's explicit statement that it was acting administratively, rather than judicially, when it examined appellee under oath.

II. The government also claims that there is a question, worthy of consideration by this Court, as to the thrust of Local Rule 3 of the Northern and Southern Districts of Iowa. The short of the matter is that, while there might have been such a question, it was not passed on in the trial court and is not, therefore, before this Court.

In *DeParcq v. United States District Court*, 235 F. 2d 692, 699 (8th Cir. 1956), the Court of Appeals for the Eighth Circuit said:

> Rule 3 is vigorously assailed as being arbitrary, discriminatory, unreasonable, destructive of the rule of comity and ex post facto. We, however, deem it unnecessary to pass upon the validity of this rule * * *.

A similar challenge was made to Local Rule 3 in the trial court in the present case. The validity of this rule, which the District Court correctly characterized as "unique and unusual," 147 F. Supp. at 597, Juris. St. at 14, does indeed pose questions of no little interest. But the trial judge specifically said:

> * * * it is not necessary for me to pass upon this question.

147 F. Supp. at 597, Juris St. at 15. Thus the question of validity of the rule is not before this Court.

All that is before the Court is a construction which a District Court has placed on a rule which the District Court made. Validity of a lower court rule is undoubtedly a question on which this Court can pass, but the meaning of a lower court rule is defined authoritatively by the court which made it. The same reasons which require this Court to accept the reading a state court gives to a state statute require it to accept the reading a District Court gives to a District Court rule.[1]

From time out of mind courts have construed statutes and rules in a restrictive manner in order to avoid otherwise serious questions as to their validity. This may well have been the reason for the District Court's action in the present case. For the court defines the purpose of Local Rule 3, and says that this perjury indictment comes "after

[1] Nor does it alter the matter that in this case the District Court for the Northern District of Iowa spoke through a judge of another district, sitting by designation. A judge sitting by designation may hold a District Court rule invalid. *Johnson v. Manhattan Co.*, 289 U. S. 479, 503 (1933). *A fortiori* he must be able to construe such a rule.

Rule 3 had served its purpose." 147 F. Supp. at 597, Juris. St. 14. And the court goes on to say again:

> "The purpose of the rule was accomplished when Hvass was denied the right to participate in the Wyrum and Lash cases and if disciplinary action against the defendant Hvass is deemed advisable such action should be instituted in the regular manner."

147 F. Supp. at 597, Juris. St. 15.

We have, then, an authoritative construction of Local Rule 3 by the only tribunal competent to construe that rule that the rule was not intended to serve as a predicate for a perjury prosecution. The purpose of the rule is to determine the fitness of lawyers seeking to appear in that court, and that purpose is here held to have been accomplished.

There is nothing extraordinary about requiring testimony to be under oath though it is no subject to the perjury-penalty. Oral depositions in civil cases are taken under oath, F. R. Civ. P. 30(c), though only false testimony as to material matters is punishable as perjury, 18 U. S. C. §1621, and examination on a deposition is not limited by the concept of materiality. *2 Barron & Holtzoff, Federal Practice and Procedure*, 311-2 (1950). Wigmore gives other examples of testimony which is taken under oath and admissible in a judicial proceeding, though it is not subject to the perjury penalty. *6 Wigmore, Evidence* §1832 (3d Ed. 1940).

It is recognized, of course, that a decision that a particular administrative regulation is or is not a "law of the United States" within the meaning of the perjury statute is, technically, a construction of the statute, and gives jurisdiction to this Court under the Criminal Appeals Act. *United States v. George*, 228 U. S. 14 (1913). But we do not have here any antedeluvian claim that an administra-

tive regulation can never be a law. Indeed the trial court expressly acknowledged that "generally speaking a rule of court has the force of law." 147 F. Supp. at 597, Juris. St. 14. Only the other day this Court reaffirmed earlier holdings that a regulation "may or may not" be "a 'law' for purposes of criminal prosecutions," depending on the structure of the particular statute. *United States v. Howard*, 352 U. S. 212, 216 (1957). And the Court thought it relevant to note the intention of the Florida legislature in determining whether violation of a Florida regulation gave rise to a federal criminal offense. *Id.* at 216-7. Surely the intention of the District Court must be equally determinative as to whether violation of one of its regulations gives rise to a federal criminal offense. If the District Court for the Northern District of Iowa has the power to expand the concept "a law of the United States" by making a rule, then it must have the power not to expand that concept by not bringing its rule within the concept. This is what it has done here. Its determination of the matter is authoritative and leaves no question worthy of consideration by this Court.

CONCLUSION

The District Court's resolution of the issue of "inherent power" is supported by the authorities, if, indeed, it is open at all in this Court. And its interpretation of Local Rule 3 as not falling within 18 U. S. C. §1621 is within its power to speak authoritatively as to the meaning of a rule it has made itself. It is manifest that the questions on which decision of the present cause depends are so unsubstantial as not to need further argument. The decision below should be affirmed.

Respectfully submitted,

WARREN B. KING
945 Northwestern Bank Bldg.
Minneapolis 2, Minnesota
CHARLES ALAN WRIGHT
301 Townes Hall
Austin 12, Texas
Attorneys for Appellee